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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,
Petitioners,

VS.

STATE OF TENNESSEE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment prohibits a district court from allocating the costs of a local desegregation plan to state defendants who originally mandated unconstitutional segregation by state Constitution and statutes.

2. Whether a district court's allocation of local desegregation costs to state defendants is an impermissible exercise of federal equity jurisdiction and an impermissible intrusion upon state legislative authority.

3. Whether a state and its agencies may fulfill their affirmative responsibilities under the Fourteenth Amendment to eliminate the vestiges of state-imposed and maintained segregation by merely removing the segregative statutes and constitutional provisions and shifting the entire burden of desegregation to local school districts and their students.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 30, 1987 (Rehearing Petition denied March 15, 1988).

OPINIONS BELOW

The opinion of the Court of Appeals (reprinted in the Appendix at A. 1) is reported at 836 F.2d 986 (6th Cir. 1987). The opinion of the Court of Appeals reverses the district court's opinion, *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, 615 F. Supp. 1139 (M.D. Tenn. 1985) (reprinted as Appendix D at A. 31).

In addition, the most recent opinions from the Sixth Circuit Court of Appeals and from the district court relating to the scope and need for additional remedial relief in this desegregation case are reprinted in the appendix, to wit: *Kelley v. Metropolitan County Board of Education*, 687 F.2d 814 (6th Cir. 1982) (Appendix E); *Kelley v. Metropolitan County Board of Education*, 511 F. Supp. 1363 (M.D. Tenn. 1981) (Appendix F); *Kelley v. Metropolitan County Board of Education*, 492 F. Supp. 167 (M.D. Tenn. 1980) (Appendix G); *Kelley v. Metropolitan County Board of Education*, 479 F. Supp. 120 (M.D. Tenn. 1979) (Appendix H).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 30, 1987, and a petition for rehearing *en banc* was denied by the Court of Appeals on March 15, 1988 (A-29). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall. . .deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of 1870, Article 11, Section 12:

> . . .No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . . .

T.C.A. §49-3701 provided until March 15, 1979:

> Interracial schools prohibited. — It shall be unlawful for any school, academy, college or other place of learning to allow white and colored persons to attend the same school, academy, college or other place of learning.

T.C.A. §49-3702 provided until March 15, 1979:

> Teaching of mixed classes prohibited. —It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement.

T.C.A. §49-3703 provided until March 15, 1979:

> Penalty for violations. — Any person violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00), and imprisonment not less than thirty (30) days nor more than six (6) months.

Michie's Tennessee Code of 1938, Section 2377 provided:

> Schools designed for children; separate schools for white and negro children. The county board of education shall designate the [elementary] schools which the children

shall attend: provided, that separate schools shall be established and maintained for white and negro children. (1925, Chapter 115, Section 13.)

Michie's Tennessee Code of 1938, Section 2393(9) provided:

Who admitted to high school: separation of white and colored pupils — Junior high schools sharing in the state and county high school funds shall be open without tuition to all children of the county; provided, that only those who have completed the eight grades of the elementary school or their equivalent shall be admitted to junior high schools of form one; and that those who have completed the six grades of the elementary school, or their equivalent, shall be admitted to junior high schools of form two or of form three; senior high schools of four grades shall be open to all children of the county who have completed the eight grades of the elementary school or their equivalent; and senior high schools of three grades shall be open to all children of the county who have completed the ninth grade, or its equivalent, in a junior high school; provided that separate schools shall be maintained for white and negro pupils. (1931, Chapter 71, Section 1.)

T.C.A. §49-6-3109 (b)(1) provides:

Unlawful discrimination.

. . .

(b)(1) No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors or national origins.

T.C.A. §49-6-2101 (f)(1) provides:

Power of boards to provide transportation.

. . .

(f)(1) No board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another.

STATEMENT OF THE CASE

This case involves the district court's power to order the State of Tennessee, its Governor, Commissioner of Education, and the State Board of Education, to fulfill their continuing constitutional duty to eliminate lingering vestiges of segregation in the Nashville, Davidson County public school system (Davidson County) imposed and supported by the State of Tennessee,[1] and

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[1] When *Brown v. Board of Education*, 347 U.S. 483 (1954) was decided, it was a state crime for local school officials in Tennessee to permit black and white children to attend school together, and constitutional provisions and civil statutes required segregation. Following *Brown*, Davidson County and others asked for help in developing desegregation plans. To these requests the Commissioner and state agencies responded through the Attorney General that segregation was no longer a state problem, it was a local one, and it was simply up to the local school districts to comply with the mandates of *Brown*. 615 F.Supp. at 1143 (A. 34-37). Article 11, Section 12, Tennessee Constitution; statutory provisions, p. 3-5, *supra*.

With no guidance from the state, the Nashville school board developed a desegregation plan which constituted "a reasonable start toward complete integration." *Kelley v. Board of Education of the City of Nashville*, 2 Race Rel. L. Rptr. 21 (1957).

However, at the same time, the Governor supported several bills which were designed to impede the desegregation process at the local level. After their passage, citizens petitioned the Nashville Board of Education to use these statutes and to disavow its previous plan, and the Board petitioned the district court regarding their use. *Kelley v.*

the district court's power to effectuate that order by requiring state participation in the funding of expensive transportation and educational remedies designed to eliminate those remaining vestiges. The Court of Appeals for the Sixth Circuit has severely limited the district court's power, placing itself directly in conflict with decisions from this Court and from the Seventh and Eighth Circuit Courts of Appeal.

In 1981 the district court in this case sought to eliminate the remaining vestiges of state-imposed segregation in Davidson County by balancing the high cost and relative benefits of busing and educational components of a desegregation plan with the limited budget of the school district which had for ten years

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Board of Education of the City of Nashville, 3 Race Rel. L. Rptr. 970, 972 (M.D. Tenn. 1958) (pupil preference statutes). The state appeared as *amicus curiae* and argued that it was premature to consider the constitutionality of these statutes until Nashville had actually submitted a plan based on the statutes. *Id.* at 973. The state later helped to defend this unconstitutional plan in court. *Kelley v. Board of Education of the City of Nashville*, 159 F.Supp. 272 (M.D. Tenn. 1958), *aff'd* 270 F.2d 209, *cert. denied*, 361 U.S. 924 (1959).

After *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the plaintiffs filed motions for further relief, and the district court ordered a comprehensive busing plan for Nashville. *Kelley v. Metropolitan County Board of Education*, 463 F.2d 732 (6th Cir. 1972). Just as it did immediately following *Brown*, the state legislature moved quickly after the imposition of mandatory busing by the Supreme Court in *Swann* to provide escape valves for the state and also havens for those opposed to desegregation. T.C.A. §49-6-2101(f)(1) provided that funds would be withdrawn from any school system which transported children for purposes of achieving a racial balance; T.C.A. §49-6-3109(b)(1) prohibited local school boards from zoning their systems to achieve racial balance. Coming as they did on the heels of Nashville's 1971 busing order when tensions were high, this action added fuel to those speaking out loudly against desegregation. At the same time the State Board of Education in Nashville was passing resolutions condemning mandatory busing, first in 1971 and then in 1982. 615 F.Supp. at 1143-44, 1148-51 (A. 34-37, 46-56).

trimmed and eliminated school programs to fund millions of dollars in first-priority fixed desegregation expenses. 492 F.Supp. at 192 (A. 173-74); 615 F.Supp. at 1142 (A. 32); (A. 208-12). The Court of Appeals in 1982 rejected the district court's balancing approach ordering a new plan including *both* significantly increased transportation in this 533 square mile county *and* the expensive educational components, including smaller classes, transition grades, remediation, black studies, magnet schools, middle school curriculum, and extensive teacher training. 511 F.Supp. at 1368-71 (A. 108-14); 687 F.2d at 816-17 (A. 64).

The state defendants were included as parties prior to consideration and approval of this new plan. In 1985 the district court ordered the state defendants to eliminate these lingering vestiges by participating in the desegregation plan crafted by it pursuant to the Court of Appeals' mandate. 615 F.Supp. 1139 (A.31). In 1987, the Court of Appeals' reversed the district court, holding that the Eleventh Amendment barred the action against the state defendants, and that the district court's order constituted an impermissible exercise of federal equity jurisdiction. 836 F.2d 986 (A. 1).

This decision is contrary to the holdings of this Court in school desegregation cases that a state must act affirmatively to eliminate all lingering vestiges of its prior unconstitutional conduct, *Green v. County School Board of New Kent County*, 391 U.S. 430, 435-36 (1969); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979). This holding also conflicts with this Court's holding in *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), that the Eleventh Amendment is no bar to requiring state monetary participation in local desegregation remedies designed to eliminate vestiges of state-imposed segregation. The holding of the Court of Appeals also conflicts with the cases from the Seventh and Eighth Circuits rejecting Eleventh

Amendment defenses and requiring state defendants to participate in the funding of local school desegregation plans.[2]

A. The Historical Underpinnings of the District Court's Order Requiring the State Defendants to Fund a Portion of the Desegregation Plan.

In 1971, pursuant to *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the District Court for the Middle District of Tennessee designed the first comprehensive desegregation plan for Davidson County, emphasizing extensive busing of students to achieve racial balance. 492 F.Supp. at 170-72 (A. 127-30). Following several years of implementation of the plan, the plaintiffs filed motions for further relief, requesting extensive and expensive remedial and educational programs, and complaining of growing racial imbalance in the city's inner core and in growth of schools on the fringes of the county excluded as too distant for busing by the 1971 order. Upon hearing all matters, the district court found that lingering vestiges of state-imposed segregation remained in the form of

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[2] *E.g. United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982); *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 435-36 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 292 (1986); *Little Rock School District v. Pulaski County Special School District*, 839 F.2d 1296 (8th Cir. 1988); *Liddell v. Board of Education of St. Louis*, 667 F.2d 643 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); *Liddell v. Board of Education*, 839 F.2d 400 (8th Cir. 1988); *Jenkins v. Missouri*, 672 F.Supp. 400 (W.D. Mo. 1987) (now on appeal); *Jenkins v. Missouri*, 593 F.Supp. 1485 (W.D. Mo. 1984), *aff'd in part*, 807 F.2d 657 (8th Cir. 1986).

See also the cases from the Court of Appeals for the Sixth Circuit ordering states to pay significant local desegregation costs, to wit: *Penick v. Board of Education*, 583 F.2d 787 (6th Cir. 1978), *aff'd* 443 U.S. 449 (1979); *Reed v. Rhodes*, 500 F.Supp. 404 (M.D. Ohio 1980), *aff'd* 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *United States v. School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978); *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974).

significantly lower achievement of black students and continuing racially identifiable schools. The district court ordered implementation of extensive remedial programs. To fund these remedial programs, the district court ordered the redrawing of the countywide desegregation busing plan, decreasing the busing and racial balance at the early grades and maximizing busing and racial balance in the upper grades. 492 F.Supp. at 192, 196 (A. 172-74, 182); 511 F.Supp. at 1368-71 (A. 108-14).

In 1982, the Court of Appeals reversed the district court and ordered the implementation of an entirely new desegregation plan, including *not only* widely expanded busing designed to eliminate all schools falling outside an acceptable racial range, *but also* the expensive educational and remedial components of the plan that had been considered by the district court. 687 F.2d 814 (A. 59). The Court of Appeals did not mention in its holding that the district court had provided funding of the educational components through decreased transportation. Prior to this hearing in the Court of Appeals the state defendants had been named as parties in a third party complaint by the local Board of Education, yet they declined to actively participate in any hearings or in the redrawing of plans.

In issuing its 1982 order requiring the new plan, the Court of Appeals found it unnecessary to examine whether intentional segregative devices had been employed. Rather, it was Tennessee's history of *de jure* segregation, without more, that warranted a new remedy when lingering vestiges of the state's prior policies remained.[3] The Court of Appeals traced the legislative history of *de jure* segregation in Tennessee, finding that the ef-

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[3] The Court of Appeals stated as follows:

> In 1955, when litigation aimed at desegregating the Nashville schools began, racial segregation was constitutionally and statutorily mandated in Tennessee, and the school board was in full compliance with those provisions. . . . [I]t was not until 1978 that Tennessee's Constitution was amended to delete the requirement of separate schools. Finally, effective March 15, 1979, more than 20 years after the laws were declared unconstitutional, the Tennessee legislature repealed the old school segregation statutes.

fects of state-imposed segregation had yet to be eliminated. On January 24, 1983, this Court denied the Board's petition for certiorari from the Sixth Circuit's decision.

In the 1983-84 school year, while the state defendants were actual parties, yet nonetheless silent parties, the district court ordered implementation of the new plan requiring extensive remediation and educational components along with county-wide busing in the 533 square mile county. These plans were estimated to cost approximately $6 million per year, or approximately three times the annual cost in the past.[4]

B. The District Court's Order Requiring the State Defendants to Fulfill Their Affirmative Responsibilities to Eliminate the Remaining Vestiges of State-Imposed Segregation.

In 1985 the district court, relying on this Court's opinions in *Milliken v. Bradley*, 433 U.S. 267 (1977), *Columbus Board of*

> It therefore is clear that when the first "comprehensive and potentionally effective desegregation order" was entered in this case in 1971, the existing racial separation in the Nashville schools had resulted from *de jure* segregation. And despite the 1971 plan's potential, the record establishes and the district court found that desegregation in the Nashville schools has never been achieved. Thus, the effects of state-imposed segregation have yet to be eradicated.

687 F.2d at 815 (A. 61-62).

[4] Between 1971 and 1982 the estimated cost of the first comprehensive desegregation plan totaled approximately $20 million. The estimated annual recurring cost of the new plan was $6 million, with start-up costs for the first year estimated to be $9 million. 615 F.Supp. at 1141 (A. 32). These figures for the new plan *did not include* the following: an undetermined amount for the Martin Luther King Magnet School for the Health Sciences, and the building of two new comprehensive high schools, Goodlettsville-Madison, and Pearl-Cohn at an estimated cost of $29 million. Payment on the bonds for these buildings is estimated to be approximately $2.93 million per year in addition to the $6 million set forth above. Amended Third Party Complaint, Record in Court of Appeals, 74; Court of Appeals Appendix, 1046.

Education v. Penick, 443 U.S. 449 (1979), and *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979), found that the state defendants had an unmet continuing affirmative duty to eliminate all remaining vestiges of historical state-imposed segregation, a duty which could not be met by the mere abandonment of prior discriminatory conduct. Since the Court of Appeals and the district court had previously found such vestiges remaining, the district court, following not only *Milliken, supra,* but numerous other circuit court and district court opinions,[5] required the state defendants to participate in providing a remedy which could not be fully implemented from Davidson County's resources.[6] Specifically, the court ordered the state defendants to pay for 60 percent of the annual recurring costs of desegregation, which was approximately the percentage increase in annual non-capital desegregation expenses under the new comprehensive plan ordered by the Court of Appeals.[7] The remedy was tailored to eliminate those vestiges of

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[5] See n. 2, *supra*.

[6] The district court stated: "[T]he order . . . is responsive to the constitutional violations and injuries that have occurred. The infusion of state funds into the Metro desegregation effort will permit Metro to offer those remedial plans which currently are part of the comprehensive remedial plan but presently are not offered because of insufficient funding. The effects of past discrimination continue to be manifested in many school age black children in terms of levels of performance on standardized testing, development of effective communication skills, and the ability to earn high school and higher education degrees. The present desegregation plan seeks to ameliorate those conditions. The payment of state funds to finance the remedial programs seek to improve the educational opportunities for black children so as to permit them to achieve a level of academic performance that reasonably could be expected had the black population not been subjected to long term segregation in public education. Finally, the court believes that the impact on the state treasury will not unduly infringe on the state's ability to carry on traditional state functions. The remedy is not intrusive on the autonomy of state officials to exercise discretion over state affairs." 615 F.Supp. at 1154 (A. 57-58).

[7] See n. 4, *supra*.

discrimination which had been imposed by state statute and constitutional provision prior to *Brown*, and which the district court and Court of Appeals previously found were fostered by the state's actions and inactions following *Brown*. *Kelley v. Metropolitan County Board of Education*, 615 F.Supp. 1139 (M.D. Tenn. 1985) (A. 31); see n. 1, *supra*.

C. The Opinion of the Court of Appeals Requiring Dismissal of the State Defendants.

A panel of the Court of Appeals[8] reversed the district court's grant of partial summary judgment to the local Board and ordered outright dismissal of the complaint against the state defendants on four grounds: first, the panel rejected the position of the Seventh and Eighth Circuits, and held that the action was barred by the Eleventh Amendment to the Constitution of the United States; second, the panel relied on a *dissenting* opinion in *United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185, 1190 (7th Cir.) (Posner, J. dissenting), *cert. denied*, 459 U.S. 1086 (1982), and held that the order was an impermissible exercise of federal equity jurisdiction; third, the court held that the issue concerned merely an internal controversy between state political subdivisions, although the original plaintiffs had sought to file briefs supporting the local Board's efforts to assure quality education for all students, and the programs funded under the district court order would

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[8] The panel consisted of Circuit Judges Engel, Nelson, and Ryan. The 1982 order requiring a new desegregation plan was entered by another panel: Circuit Judges Edwards, Jones, and Celebrezze, 687 F.2d 814 (6th Cir. 1982) (Celebrezze dissenting), *cert. denied*, 459 U.S. 1183 (1983).

directly benefit minority children;[9] fourth, in the panel's opinion, the board had waited too long to bring in the state defendants, although the state defendants were included before the expanded desegregation remedy tailored to remove all remaining lingering vestiges of state-imposed segregation was developed and ordered, and the state defendants were not shown to be prejudiced in any way by the passage of time during which the local board and its students shouldered the entire financial burden of desegregation.[10]

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[9] The Court of Appeals' opinion relies upon *South McComb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), for the proposition that a federal court should not intervene between a state and its local government. Davidson County respectfully submits that it is not seeking relief against the Tennessee defendants "in its own right" as the panel suggests pursuant to *South McComb*. Instead, Metro is diligently seeking to implement fully the desegregation plan the district court and presumably the Court of Appeals deem appropriate to remedy the vestiges of segregation and continue to provide quality education to all of its students. If Metro cannot step into the shoes of the plaintiffs for these purposes (see *Akron Board of Education v. State Board of Education of Ohio*, 490 F.2d 1285 (6th Cir. 1984)), and protect their rights along with the rights of all other school children in Nashville, then plaintiffs everywhere will be required at great expense to continually litigate their constitutional rights in order to assure themselves of complete remedies and quality education.

[10] The Court of Appeals merely mentioned the concept of laches and adopted it without discussion, never asserting how the state defendants could have been injured by the delay and never discussing where fairness and equity fit into the application of the doctrine. 836 F.2d at 1000 (A. 27). As in the St. Louis case, fairness dictates that the "primary constitutional wrongdoer" shoulder some of the burden of eliminating the vestiges of discrimination. *Liddell v. Board of Education of the City of St. Louis*, 491 F.Supp. 351, 359 (E.D. Mo. 1980). Certainly, the burden should not be borne alone by students in the local school system, particularly given Davidson County's tight budget constraints after the 1982 order. The state defendants have had an opportunity to provide input into the desegregation plan, and they have repeatedly refused to do so. Thus, no prejudice can be asserted by them.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Ignored the Precedent of this Court By Dismissing All Claims Against the State Defendants, Who Have an Admitted but Unmet Affirmative Duty to Eliminate the Lingering Vestiges of State-Imposed Segregation in Davidson County

The Court of Appeals recognized that Tennessee has an affirmative duty to eliminate the vestiges of state-imposed segregation. 836 F.2d at 994 (A. 15). However, under its ruling, the mere removal of pre-*Brown* statutory and constitutional provisions is sufficient to meet this duty. This approach deviates from this Court's mandate that a state eliminate all such vestiges, and that as long as these vestiges remain, the state defendants are continuing to violate the Constitution. *Green v. County School Board of New Kent County*, 391 U.S. 430, 435-36 (1968), *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449, 458-59 (1979).[11]

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[11] In one portion of its opinion, the Court of Appeals' appears to state that no vestiges of state-imposed segregation remain in Nashville — that remaining vestiges are at this date likely caused by "the imbalance in residential patterns", quoting *Austin Independent School District v. United States*, 429 U.S. 990, 994 (1976) (Powell, J. concurring in grant of certiorari). 836 F.2d at 994 (A. 15). The Court of Appeals cites nothing from the record to indicate that only residential patterns are to blame for remaining vestiges, particularly lowered achievement scores of black students. Indeed, such a holding would be blatantly inconsistent with the Court of Appeals' own previous order in 1982, 687 F.2d 814, and would warrant at once a dismissal of the entire lawsuit in Davidson County based upon the county's achievement of unitary status. The Court of Appeals' 1982 order required a new desegregation remedy to eliminate the lingring effects of state-imposed segregation. Significantly, the Court of Appeals never addresses, much less finds clearly erroneous, its own opinions and those of the district court that vestiges of state action in the form of educational deficiencies and resegregation remain to be corrected in Davidson County.

In this case, the district court found that the state had done nothing to eliminate the vestiges of segregation. Indeed, the district court found that following *Brown*, the state, through statutes and public pronouncements, not only failed to provide leadership, but in fact had helped fuel desegregation furor.[12] The Court of Appeals' opinion discounts this conduct without indicating that the district court's findings are clearly erroneous, and does not state how this conduct can be consistent with a state's affirmative constitutional responsibility. It is simply impossible to reconcile the Court of Appeals' opinion with *Green, Dayton,* and *Columbus, supra.*

Indeed, it is impossible to reconcile the Sixth Circuit's opinion with other Sixth Circuit holdings pursuant to this Court's precedent ordering state participation, particularly *Penick v. Columbus Board of Education*, 663 F.2d 24 (6th Cir. 1981) and *Reed v. Rhodes*, 662 F.2d 1219 (6th Cir. 1981). In these cases, Ohio, which had not mandated segregation prior to *Brown*, was required to participate in expensive desegregation remedies only because it knew of local segregated conditions, structured its administrative procedures in such a way as to avoid dealing with segregation, treated segregation differently from other aspects of school conditions, and continued to fund segregated school systems. When read alongside *Penick* and *Reed*, the panel's opinion places upon Ohio a greater "affirmative duty" than Tennessee, which had initially required Davidson County by criminal statute and constitutional provision to segregate its schools. In the words of the St. Louis desegregation case, Ten-

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[12] 615 F.Supp. at 1143-44, 1148-51 (A. 34-37, 45-57); see n. 1, *supra.*

nessee, like Missouri,[13] stands before the federal courts as a "primary constitutional wrongdoer" which has done absolutely nothing for the minority children who today bear the burden of its wrongdoing.

In effect, the Sixth Circuit permits states which impose segregation to avoid taking a positive role by enunciating a hands-off policy designed to place the entire onus on local school systems having high percentages of minority children, while simultaneously permitting the same officials to voice opposition and to oppose by statute the means needed by local boards to achieve desegregation. The Court of Appeals has merely given lip service to this Court's long-standing concept of affirmative duty, and has accepted the state's elimination of offending statutes and constitutional provisions in 1979 as both the beginning and end of its obligation to the victims of discrimination.

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[13] *Liddell v. Board of Education of the City of St. Louis*, 491 F.Supp. 351, 359 (E.D. Mo. 1980). See later opinions reaffirming and expanding state liability, p. 21, *infra*.

The facts in the St. Louis case are remarkably similar to Nashville. In both cases, state statutes and constitutional provisions mandating segregation were in force at the time of *Brown* and were not stricken until many years later — in Missouri in 1976 and in Tennessee in 1979. In both cases, a state government officer or entity had declared the unconstitutional statutes invalid after *Brown*. Further, in both cases the city school system was the only party defendant for several years. Based on these facts, the district court held that Missouri was a "primary constitutional wrongdoer" which must do more than abandon its prior discriminatory conduct. *Id.*

The Nashville case is an even stronger case for liability than *Liddell*. Nowhere in the opinions from the Eighth Circuit or the district court is there any hint of actions taken by the state after *Brown* to thwart desegregation in local school systems. In Tennessee, after almost every major decision concerning desegregation, the state spoke out against desegregation, through laws and policies. 615 F.Supp. at 1144, 1148-50 A. 34-37, 45-57); see n. 1, *supra*.

II.

The Court of Appeals' Opinion Conflicts With *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*) and With Decisions From the Courts of Appeal for the Seventh and Eighth Circuits Which Have Rejected the Eleventh Amendment as a Defense to State Responsibility for Local School Desegregation Plans

In *Milliken II*, the state defendants argued that the Eleventh Amendment barred any order requiring them to pay one-half of the desegregation costs for Detroit, contending that such an order was in practical effect an award of money damages against the state based upon the prior misconduct of state officials which was contrary to this Court's holding in *Edelman v. Jordan*, 415 U.S. 651 (1974). This Court rejected that argument, holding that the components of the desegregation plan to be paid for by Michigan were designed to eliminate the remaining vestiges of state-imposed segregation. Those components ordered into effect prospectively were "designed to wipe out continuing effects of inequality produced by the inherently unequal dual school system long maintained by Detroit." *Id.* at 289-90. The case was not a lawsuit for damages against Michigan which was barred by the Eleventh Amendment. Rather, the programs for which the state defendants were to provide funds would help to restore the victims of unlawful past state conduct to a position of equality in the future, rather than simply compensating them for unconstitutional conduct completed in the past.

Since *Milliken II*, the prospective compliance exception to the Eleventh Amendment has been utilized regularly in desegregation cases, particularly with the growing round of expensive new desegregation remedies, requiring not only extensive cross-town busing, but also concentrated and expensive efforts to improve the quality of education for victims of discrimination. The Eighth Circuit Court of Appeals and its district courts have rejected Missouri's and Arkansas' Eleventh Amendment defenses

to state liability, *e.g. Liddell v. Board of Education*, 667 F.2d 643 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); *Liddell v. Board of Education*, 839 F.2d 400 (8th Cir. 1988); *Little Rock School District v. Pulaski County Special School District*, 839 F.2d 1296 (8th Cir. 1988); *Jenkins v. Missouri*, 672 F.Supp. 400 (W.D. Mo. 1987) (now on appeal). In addition, the Seventh Circuit Court of Appeals has rejected Indiana's Eleventh Amendment defense in the Indianapolis case. *United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982). The Sixth Circuit admits in its opinion that there is a split among these circuits concerning this critical issue[14] which begs definitive resolution, given the frequency with which it is arising, and the millions of dollars in local desegregation costs now being paid by states in other circuits.

In holding contrary to other circuits, the Court of Appeals relies upon a number of cases which do not involve desegregation remedies nor the concept of continuing constitutional violation.[15] In particular, the Sixth Circuit relies heavily on

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[14] The Sixth Circuit cites the Seventh and Eighth Circuit opinions and indicates that the circuits are divided. 836 F.2d at 995, n. 4 (A. 17). The court then states "[n]one of the court of appeals opinions we have examined can be said to demonstrate convincingly that the Supreme Court's sovereign immunity decisions do not mean what they seem to say."

The court also attempts to downplay the Seventh Circuit's rejection of the state's Eleventh Amendment defense by noting that the United States is a party to that case. *Id.* A review of the opinions in Indianapolis will indicate clearly that the United States is nothing more than a nominal party in the inter-district phase of the lawsuit, and the order requiring state financing was entered on the motion of the local school district in Indianapolis, not on the motion of the United States. *See United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982).

[15] *E.g. Louisiana v. Jumel*, 107 U.S. 711 (1883); *Welch v. State Department of Highways*, 483 U.S. ____, 107 S.Ct. 2949, 97 L.Ed.2d 389 (1987); *Green v. Mansour*, 474 U.S. 64 (1985).

Papason v. Allain, 478 U.S. ____, 92 L.Ed.2d 209 (1986), for the proposition that the Eleventh Amendment bars actions against state defendants unless there is an ongoing constitutional violation found. In that case the school board brought an action against Mississippi, attacking the state's distribution of federal land grant funds for the benefit of public schools. Insofar as the claim was deemed to be one for a one-time restoration of the lost corpus of the funds, this Court held that the action was barred as one for "an accrued monetary liability" contrary to *Milliken II*. However, the plaintiffs had also asserted an equal protection claim challenging the distribution of school lands — a continuing violation for which *Milliken* and *Ex Parte Young*, 209 U.S. 123 (1908), provided a remedy. This Court allowed that action to be maintained since it challenged " the present disparity in the distribution of the benefits of state-held assets and not the past actions of the state." 92 L.Ed.2d at 229. Thus, it appears that *Papason* merely reiterates the rules and rationale set forth initially by this Court and the Sixth Circuit in *Milliken II*.

The concept of continuing violation — involving a *current disparity* is what is presented in this case and in those desegregation cases from the Seventh and Eighth circuits which rely on *Milliken II*.[16] The minority school children of Davidson County are performing on significantly lower levels than the white school children. Racial imbalance in school zones has also per-

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[16] The Court of Appeals seeks to distinguish *Milliken II* from this case, writing that "the payment of money was not *perceived* to be all that was required of the state defendants in *Milliken*" — that the state and Detroit officials were required to put into effect certain programs. 836 F.2d at 991 (A. 10). Such a distinction not only lacks substance, it ignores reality. In neither *Milliken* nor any of the cases from other circuits have the state defendants been more than recalcitrant financial participants. The simple fact is that local school systems in Missouri, Michigan, Arkansas, and Indiana have administered the desegregation programs ordered, with the various states simply contributing financial support — support that is directed to eliminating the current disparity caused by state-imposed segregation.

sisted. These vestiges of discrimination do not vanish overnight. They are current disparities — current vestiges. Where current disparities exist, there is a continuing constitutional violation and a concomitant affirmative duty. As this Court stated in *Milliken*:

> These [educational programs] were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke. . . . Rather, by the nature of the *antecedent violation*, . . . the victims of Detroit's de jure segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of *past misconduct*.

Milliken v. Bradley, 433 U.S. at 290 (emphasis added).

Certainly, to the extent that Davidson County has curtailed educational programs to fund only minimally the desegregation plan ordered by the Sixth Circuit, some strides have been made toward eliminating current disparities. Where those disparities still exist, the Courts of Appeal for the Seventh and Eighth Circuits which have considered the issue would place a heavy burden upon the State of Tennessee. The Sixth Circuit has permitted Tennessee to avoid the obligation, to the detriment of the very students for whom the Sixth Circuit has ordered relief.

Such a distinction not only lacks substance, if sanctioned by this Court it creates an unreasoned and inequitable policy. As indicated, the State of Tennessee has historically abdicated its affirmative duty, placing the entire onus of desegregation efforts on cities having large populations of minority students. Indeed, the state defendants have never lifted a finger to help Metro plan the second generation plan, much less to help implement it. It is little wonder that the district court couched its 1985 order in terms of requiring the state to eliminate the prior vestiges of its segregation actions rather than specifically requiring the state defendants to bus and educate. They had indicated by their silence that they had never intended to do so. Had the district court ordered the state defendants specifically to bus and educate, an order which the district court could certainly have entered, the result would have been the same.

III.

The Court of Appeals' Opinion that State Ordered Participation in Local Desegregation Remedies is an Inappropriate Exercise of Federal Equity Jurisdiction Conflicts with Opinions From the Seventh and Eighth Circuits, Along With its Own Opinions Involving Liability of Northern States for Local Desegregation Efforts

The Sixth Circuit's opinion cites a *dissenting* opinion in *United States v. Board of School Commissioners of City of Indianapolis*, 677 F.2d 1185, 1190-91 (7th Cir.) (Posner, J. dissenting), *cert. denied*, 459 U.S. 1086 (1982) for the proposition that an award of desegregation costs against a state is not an appropriate exercise of federal equity jurisdiction, since the state itself should decide how local school systems will finance their operations. The Court of Appeals' reliance on this dissent indicates, without more, that the Sixth Circuit is in conflict with the Seventh Circuit, which held in the Indianapolis case that "allocating costs of a desegregation plan is, of course, part of the remedial power of the district court", *United States v. Board of School Commissioners for the City of Indianapolis*, 677 F.2d at 1186, *citing Milliken II*, 433 U.S. at 289-90. Using this broad authority, the Seventh Circuit in *Indianapolis* required the state defendants to pay 100 percent of the desegregation costs in Indianapolis, *United States v. Board of School Commissioners for the City of Indianapolis*, 677 F.2d 1185 (7th Cir. 1982). In St. Louis the Eighth Circuit has required Missouri to pay 100 percent of certain costs totaling millions of dollars; *Liddell v. Board of Education of St. Louis*, 801 F.2d 278, 283 (8th Cir. 1986); 731 F.2d 1294, 1305, 1309, 1312 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984); 677 F.2d 626, 642 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); in Little Rock the Eighth Circuit has also required Arkansas to pay 100 percent of the cost of much of the city's desegregation plan, *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 435-36 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 292

(1986). Significantly, in prior cases the Sixth Circuit itself has ordered payment of substantial local desegregation costs by state defendants, including most pointedly, in Detroit, *Bradley v. Milliken,* 540 F.2d 229, 240, 246 (6th Cir. 1976), *aff'd,* 433 U.S. 267 (1977) (State required to pay 75 percent of the costs of purchasing 150 school buses and 50 percent of the educational components).[17] In none of these cases have these courts, including the Sixth Circuit, adopted the present panel's restricted view of the district court's broad equitable authority.

The well-considered reason for the willingness of these courts to require state funding of local desegregation plans certainly comes from *Milliken II, supra.* As the Sixth Circuit recognized in that case, students in a school system should not be disadvantaged by having their regular educational resources severely affected or curtailed because of the necessity to fund special desegregation costs.[18] Such a result would penalize the very vic-

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[17] *See also Penick v. Columbus Board of Education,* 519 F.Supp. 925, 942 (S.D. Ohio 1981) (state defendants to share equally with Columbus defendants all expenses relating to desegregation), on remand from *Penick v. Columbus Board of Education,* 663 F.2d 24 (6th Cir. 1981); *Reed v. Rhodes,* 500 F.Supp. 404 (N.D. Ohio 1980), *aff'd,* 662 F.2d 1219 (6th Cir. 1981) (state defendants to reimburse local defendants for state's one-half share of desegregation-related expenses incurred so far); *Berry v. School District of Benton Harbor,* 515 F.Supp. 344 (W.D. Mich. 1981), *aff'd and remanded,* 698 F.2d 813 (6th Cir.), *cert. denied,* 464 U.S. 892 (1983) (Michigan required to pay 60 percent of certain educational programs and 100 percent of transportation programs relating to magnet schools).

[18] The Sixth Circuit specifically prohibited this result in requiring Michigan to pay Detroit's desegregation costs;

> Since Michigan officials and agencies were guilty of acts which contributed substantially to the unlawful *de jure* segregation that exists in Detroit, the state has an obligation not only to eliminate the unlawful segregation *but also to insure that there is no dimunition in the quality of education.*

Bradley v. Milliken, 540 F.2d 229, 245 (6th Cir. 1976) (emphasis supplied).

tims of past discrimination which the holdings are designed to benefit. In the instant case, the Court of Appeals has previously ignored the district court's efforts to balance the city's financial resources to insure continuation of quality education as well as desegregation. See discussion *supra*, pp. 8-9. *Now* the Sixth Circuit has rejected the efforts of Davidson County on behalf of the plaintiffs and all of its students,[19] to both desegregate and to educate.[20]

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[19] The Court of Appeals states that the plaintiffs were not parties to this litigation. 836 F.2d at 988 (A. 3). The plaintiffs attempted to file a brief on behalf of the Board of Education, presumably to support Davidson County's efforts to continue to enhance educational quality for all students, including minority students. However, the Court of Appeals refused to permit the plaintiffs to file a brief, indicating upon their motion for extension that they were not parties. Plaintiffs' counsel were present at all arguments and proceedings concerning state liability, and *never withdrew* from this case. If it is left only to plaintiffs' counsel to pursue what is necessary for both desegregation and quality education, then individual plaintiffs will continually be required to resort to expensive litigation to protect their rights. To fault the Davidson County Board of Education for taking up the mantle at this stage to protect the interests of school children, including the plaintiffs, demonstrates the lengths to which the Sixth Circuit has gone in refusing to place the burden for desegregation on those who were responsible for the problem in the first instance.

[20] The Sixth Circuit stated that the Board of Education has never contended that it could not pay for the desegregation remedies. Nothing could be farther from the fact — indeed, the Board's motion for summary judgment upon which the district court ruled demonstrated the severe financial problems that had accompanied the imposition of these remedies and that would accompany the imposition of the new remedies. In a finding that has not been attacked by the state defendants nor reversed by the Sixth Circuit as clearly erroneous, the district court held that shifting this portion of the expenses to the state defendants would permit adequate funding of those expanded educational programs. A. 208-212; 615 F.Supp. at 1154 (A. 57-58).

The Court of Appeals' decision would have Davidson County continue to juggle its budget, "robbing Peter to pay Paul", trimming its programs to only minimally fund the desegregation efforts. Such result is not permitted by *Milliken II*, and has not been required *in any case* considering state responsibility for remaining vestiges of state-imposed segregation. The Sixth Circuit has narrowly defined a district court's authority in this regard, contrary to the decisions of this Court, its own prior decisions, and the decisions of the Seventh and Eighth Circuits.

CONCLUSION

This case presents the Court with a question of national importance. As the years have passed, local desegregation remedies have become increasingly comprehensive and expensive, requiring not only concentration on transportation and racial balance but also upon special educational opportunities for the victims of past discrimination. A growing number of school districts are looking to states which mandated or maintained segregation for help in implementing desegregation plans and in ensuring the continuation of quality education, pursuant to *Milliken II*.

The Sixth Circuit decision in this case begs for review because it fails to apply this Court's oft-repeated concepts of continuing affirmative duty and continuing constitutional violations in desegregation cases, and because it conflicts with opinions in other circuits. The conflict in circuits will lead to confusion across the nation concerning Eleventh Amendment defenses to state participation in desegregation remedies and to confusion in the scope of a district court's traditional broad equitable powers.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

87 1774

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

Petitioners,

VS.

STATE OF TENNESSEE, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX A

Nos. 85-5837/5838

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert W. Kelley, et al.,
Plaintiffs,

v.

Metropolitan County Board of Education of
Nashville and Davidson County, Tennessee, et al.,
Defendants-Third-Party
Plaintiffs-Appellees,
Cross-Appellants,

v.

State of Tennessee; Lamar Alexander,
Governor of the State of Tennessee;
Robert L. McElrath, Commissioner of
Education and State Board of Education,
Third-Party Defendants-Appellant,
Cross-Appellees.

On Appeal from the United States District
Court for the Middle District of Tennessee.

Decided and Filed December 30, 1987

Before: ENGEL, NELSON and RYAN, Circuit Judges.

DAVID A. NELSON, Circuit Judge. This case originated in 1955 as a desegregation action brought by a group of black school children and their parents against the school board of Nashville, Tennessee. A similar action was filed in 1960 against

the board of education of Davidson County, in which Nashville is located. The actions were consolidated, and the original defendants were replaced by the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee ("Metro"). The subsequent history of the litigation is well set out in the district court's opinion, reported at 615 F.Supp. 1139 (M.D. Tenn. 1985), and in an earlier opinion reported at 492 F.Supp. 167 (M.D. Tenn. 1980); we shall not repeat the story here.

The present dispute began in 1981 — some 26 years after the start of the lawsuit — when Metro filed a third-party complaint against the State of Tennessee, the state board of education, and certain state officials. As amended in 1983, the third-party complaint asked, in essence, that the state be required to pay the full cost of implementing the desegregation remedies ordered by the district court in 1971 and subsequent years.

Metro moved for partial summary judgment on its third-party complaint. In disposing of that motion the district court held that "a retroactive award for costs already sustained" would be prohibited by the Eleventh Amendment of the United States Constitution. 615 F.Supp. at 1147. Finding no constitutional impediment to an award of relief prospectively from the date on which the third-party complaint was filed, however, the court entered an order reading as follows:

> "The State of Tennessee and state officials named as defendants shall be enjoined from refusing to carry out their duty to participate in the elimination of the vestiges of past discrimination in the State's public education system. To ensure compliance with the injunction, the Court orders the State to assume sixty percent (60%) of the costs directly attributable to Metro's desegregation program from and after the date of the filing of this petition on March 16, 1981...."

The state and the other third-party defendants appeal from that order, arguing, among other things, that it violates the

principle of sovereign immunity. Metro cross-appeals, contending that the state ought to be held responsible not only for costs incurred from and after the filing of the third-party complaint, but also for costs incurred in the decade before. The original plaintiffs are not parties to either appeal.

Having concluded that the federal courts would not be justified in shifting any of the costs in question from Metro to the State of Tennessee, we shall reverse the district court's order, deny the cross-appeal, and direct that judgment be entered in favor of the state and the other third-party defendants.

I

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This language does not, by its terms, insulate a state from suit by its own citizens. The Supreme Court of the United States has long held, however, that such suits are barred unless the state has long held, however, that such suits are barred unless the state has consented to be sued. *Hans v. Louisiana,* 134 U.S. 1 (1980). Adoption of the Eleventh Amendment, the Supreme Court has declared, constituted an "affirmation that the fundamental principle of sovereign immunity limits the grant of [federal] judicial authority in Art. III" regardless of the plaintiff's citizenship. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 98 (1984); *cf. Ex parte New York,* 256 U.S. 490, 497 (1921).[1]

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[1] Justice Brennan, in a series of powerful dissents, has argued that insofar as judges have extended the doctrine of sovereign immunity beyond the actual language of the Eleventh Amendment, the doctrine ought to be repudiated as lacking "a textual anchor, a firm historical foundation, or a clear rationale." *Atascadero State Hospital v.*

The principle of sovereign immunity is a "broad" principle, as well as a fundamental one. *Welch v. State Dep't of Highways,* 483 U.S. ____ 107 S.Ct. 1941, 2952, 97 L.Ed.2d 389, 404 (1987). And that broad fundamental principle, as Justice Powell wrote in *Welch,* "has been among the most stable in our constitutional jurisprudence." *Id.,* 97 L.Ed.2d at 405. It constitutes "an absolute bar" to a state's being sued by its own citizens, among others, *Monaco v. Mississippi,* 292 U.S. 313, 329 (1934)—and if a state cannot be sued by its own citizens, *a fortiori* it cannot be sued by its own political subdivisions, which are creatures of the state and exist only at the state's sufferance.

The State of Tennessee is not the only third-party defendant in the case at bar, of course, but along line of Supreme Court decisions teaches that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459, 464 (1945), as quoted and followed in *Edelman v. Jordan,* 415 U.S. 651, 663 (1974). Although *Edelman* was a suit against individual officers, as the Supreme Court subsequently explained, "the case was in effect a suit against the State itself because a judgment payable from state funds was demanded." *Cory v. White,* 457 U.S. 85, 90 (1982).

Scanlon, 473 U.S. 234, 257 (1985); cf., inter al., Employees of the Dep't of Public Health & Welfare v. Missouri Dep't of Public Health & Welfare, 411 U.S. 279, 298 (1973); Edelman v. Jordan, 415 U.S. 651, 687 (1974); *Yeomans v. Kentucky,* 423 U.S. 983 (1975); *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 125 (1984); *Welch v. State Dep't of Highways,* 483 U.S. ____, ____, 97 L.Ed.2d 389, 411 (1987). Obviously, however, it is not within the province of an inferior court such as ours to reverse Supreme Court precedent that "has been assumed to be the law for nearly a century." *Welch,* 483 U.S. at ____, 97 L.Ed.2d at 411 (Scalia, J., concurring).

The third-party action brought by Metro against the State of Tennessee and its officials is essentially one for the recovery of money from the state, and the presence of individual officials as nominal third-party defendants cannot make of the action something it is not. The "absolute bar" of sovereign immunity therefore applies. The applicability of the bar of sovereign immunity simply is not affected by the circumstance that the nominal defendant is an individual state official, *Ford Motor Co., supra,* any more than it is affected by the circumstance that the relief sought is equitable rather than legal in nature, *Papason v. Allain,* 478 U.S. ____, 92 L.Ed.2d 209, 226 (1986), or the circumstance that the case is one in which a federal constitutional violation is alleged. *Pennhurst, supra; Edelman, supra.*

It is true that the constitutional provision that was violated by the State of Tennessee (and by Metro's predecessors) is the Equal Protection Clause of the Fourteenth Amendment, and not, as in *Hans v. Louisiana,* the Contract Clause of the original Constitution. If the nature of the constitutional violation makes any difference, however, it cuts in favor of respecting the state's sovereign immunity in this case. Although it remains to be decided whether Congress has the power to abrogate the states' immunity from lawsuits in which a violation of the original Constitution is alelged (see *Welch,* 107 S.Ct. at 2946, 97 L.Ed.2d at 397), it is clear that "Congress *can* abrogate the Eleventh Amendment without the States' consent when it acts pursuant to its power "to enforce, by appropriate legislation' the substantive provisions of the Fourteenth Amendment." *Welch,* 107 S.Ct. at 2946, 97 L.Ed.2d at 397 (quoting *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976), and § 5 of the Fourteenth Amendment) (emphasis supplied). The logic of current Supreme Court doctrine seems to be that the question whether the states are to be made subject to suit for violations of the Fourteenth Amendment is a question that has been entrusted to Congress, not to the courts. *Cf. Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242-43 (1985).

It might once have been arguable that Congress abrogated the states' immunity from suit for Fourteenth Amendment violations when it enacted the Ku Klux Klan Act of 1871, the precursor to 42 U.S.C. § 1983, but the Supreme Court has rejected the contention that Congress intended, by the general language of § 1983, to override the states' traditional sovereign immunity. *Quern v. Jordan,* 440 U.S. 332, 341 (1979). "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hospital,* 473 U.S. at 242. Congress has enacted no such statute, and the federal courts have no authority to enact one for it.

It bears emphasis that we are not here called upon to adjudicate the rights of plaintiffs suing to obtain the equal educational opportunities promised them in *Brown v. Board of Education,* 347 U.S. 483, 493 (1954). Those plaintiffs have long since won their case. They won it without ever having asserted any claim against the state. They are already receiving—through decrees that do no violence to the principle of sovereign immunity—the full measure of relief to which they are entitled under the Constitution.

The issue before us is not whether children in the Metro schools will receive the benefits of the enhanced educational programs that the district court ordered Metro to develop and implement. The educational components of Metro's desegregation plan have alredy been affirmed by this court (687 F.2d 814 (6th Cir. 1982), *cert. denied,* 459 U.S. 1183 (1983)), and Metro makes no claim—notwithstanding an admission at oral argument that those components "have not been as fully implemented as they should be"—that it is incapable of complying with the educational components of the plan. Similarly, the issue is not whether the school children will be transported in accordance with the mandatory busing plan which, as modified several years ago to meet the requirements of this court, has been in effect for more than a decade and a half. That busing

plan, we are told, "has been fully implemented." Neither the district court's broad power to require that the Metro shcools be desegregated nor its power to require appropriate action to eliminate any lingering consequences of *de jure* segregation is in question here, and the vitality of the Supremacy Clause of the United States Constitution will not suffer in any way from our reversal of the district court's order. The contest between Metro and the State of Tennessee is a contest not about desegregation, but about money.

The amount of money at issue is substantial; it comes, we are told, to some $6 million per year. The state currently underwirtes about 30% of Metro's non-transportation costs, and it pays a still larger share of the costs of transportation; Metro, however, wants more. The state treasury can be compelled to provide more, Metro argues, because of the "prospective compliance" exception carved out of the doctrine of sovereign immunity by *Ex parte Young,* 209 U.S. 123 (1908).

In *Ex parte Young,* as the district court explained,

> "the Supreme Court recognized the 'prospective-compliance' exception to the jurisdictional bar of the Eleventh Amendment, permitting federal courts to enjoin ongoing conduct by a state official that is in violation of federal law. The 'fiction' of *Young* holds that a state may not authorize an unconstitutional action by its officers. Hence, for Eleventh Amendment purposes, a state official is stripped of his official status and subject to the consequences of his conduct when he acts in an unlawful manner." 615 F.Supp. at 1146.

Thus it was that the Supreme Court held, in *Young,* that although the state itself could not be enjoined from enforcing an unconstitutional statute, individual state officials could be; officials "who threaten and are about to commence proceedings ... to enforce...an unconstitutional act... may be enjoined by a Federal court of equity from such action." 209 U.S. at 156.

Unlike the individual state officials in *Ex parte Young*, the individual third-party defendants in the case at bar are not threatening to enforce any unconstitutional act. The district court says, in its opinion, that the Tennessee officials are being enjoined "from continuing to refuse to discharge their duty to participate in the implementation of desegregation of Metro schools," 615 F.Supp. at 1151, but the "participation" mandated by the district court's order is purely financial; the officials will not be in contempt of the court's order if they pay 60% of Metro's desegregation costs out of the state treasury, and they will be in contempt if they fail to do so. The Tennessee officials are not currently doing anything wrong, and they have not been joined in this case to prevent them from doing anything wrong; they have been joined solely to permit one sometime constitutional wrongdoer to recover monetary compensation from another. But as the Supreme Court has repeatedly told us, such "compensatory" interests "are insufficient to overcome the dictates of the Eleventh Amendment." *Green v. Mansour*, 474 U.S. 64, 68 (1985); *cf. Papasan*, 92 L.Ed.2d at 226-27.

The Supreme Court explained in *Papasan* that "*Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly ... to meet third-party interests such as compensation." *Papasan*, 92 L.Ed.2d at 226-27. The case at bar is one where the relief sought is intended "to meet third-party interests such as compensation," and not one where "relief against the state official directly ends...[an ongoing] violation of federal law." *Ex parte Young* has no legitimate application here.

That Metro's "compensatory interest" is being satisfied only prospectively is a circumstance devoid of constitutional significance. A case in point is *Louisiana v. Jumel*, 107 U.S. 711 (1883). There, as here, unconstitutional state action had led

to the assertion against state officers of what amounted essentially to claims for both retrospective and prospective monetary relief; both forms of relief were held barred by the sovereign immunity doctrine. Holding that the state officials simply were not subject to suit in the federal court, the Supreme Court concluded that the relief sought — future relief, as well as relief in respect of obligations already accrued—could not be granted in the absence of a waiver by the state of its sovereign immunity:

> "When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for ... would be to exercise such a power." *Jumel,* 107 U.S. at 728.

Although it has been afforded many opportunities to do so, the Supreme Court has never repudiated *Louisiana v. Jumel;* in literally dozens of subsequent decisions, on the contrary, the Supreme Court has cited that seminal case or its progeny with every indication of approval. (See, *e.g., Great Northern Life Insurance Co. v. Read,* 322 U.S. 47 (1944), and the numerous cases there cited: "[The] ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed." *Id.* at 51.) If *Louisiana v. Jumel* is still good law, it is controlling here.

It could be argued, perhaps, that *Louisiana v. Jumel* was overruled *sub silentio* by *Milliken v. Bradley,* 433 U.S. 267 (1977), the Supreme Court decision that comes closer than any

other to justifying the result reached by the district court in this case. The monetary relief granted in *Milliken* was merely ancillary to other affirmative relief, however, and the monetary relief granted here is not. That fact, coupled with the reasoning of post-*Milliken* cases in which the Supreme Court has "aggressively" expanded the doctrine of sovereign immunity (*Welch v. State Highway Dep't,* 107 S.Ct. at 2958, 92 L.Ed.2d at 411 (Brennan, J., dissenting)), leads us to believe that the principle followed in *Louisiana v. Jumel* is still sound.

The payment of money was not perceived to be all that was required of the state defendants in *Milliken.* As we noted in our own opinion in that case, 540 F.2d 229, 240 (6th Cir. 1976), "the District Court directed that the Detroit Board *and the State* put into effect certain comprehensive programs which were found to be essential to the success of the desegregation effort." (Emphasis supplied.) That understanding was shared by the Supreme Court; the Court's opinion notes that "the [district] court directed the Detroit Board *and the State Department of Education* to institute a testing program," and "the [district] court ordered the Detroit Board *and the state defendants* to institute comprehensive programs as to the four educational components [of the desegregation plan.]" 433 U.S. at 276-77 (emphasis supplied). It was immediately after this sentence that the Supreme Court noted that "[t]he cost of these four programs ... was to be equally borne by the Detroit School Board and the State." *Id.* at 277.

The Supreme Court went on to hold, in *Milliken,* that the district court's decree "fits squarely within the prospective-compliance exception" carved out of the sovereign immunity doctrine by *Ex parte Young, supra.* The exception is a narrow one; in the words of the *Milliken* court, it merely "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." 433 U.S. at 289. "*The order challenged here,*" the *Milliken* court continued,

"does no more than that." Id. (emphasis supplied). The order was thus within the district court's constitutional power, as the Supreme Court subsequently explained, "even though accompanied by a substantial *ancillary* effect on the state treasury." *Papasan,* 92 L.Ed.2d at 227 (emphasis supplied).[2]

The effect on the state treasury of the order entered by the district court in the case at bar is not "ancillary" to anything at all, other than the command to "assume sixty percent (60%) of the costs directly attributable to Metro's desegregation program." The order to pay is ancillary only to itself, in other words, and therefore it goes beyond *Milliken.* If the payment order in *Milliken* had not been ancillary to some command outside itself, affirmance of the order would have been utterly inconsistent with *Jumel.* The latter decision was specifically called to the Court's attention in the brief filed by the state defendants in *Milliken* (see 53 L.Ed.2d 1224), and the fact that *Jumel* was not cited in the *Milliken* decision thus suggests that the Court did not intend to overrule it.

That conclusion is strengthened, we believe, by *Pennhurst, supra,* decided seven years after *Milliken.* Justice Powell, who delivered the opinion of the Court in *Pennhurst,* there cited both *Jumel* and *Ford Motor, supra,* in support of the "well established" proposition that "[t]he Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.' " *Pennhurst,* 465 U.S. at 101 (quoting *Ford Motor, supra.*) Justice Powell's own concurring opinion in *Milliken* had emphasized that much of the Court's opinion in that case possessed only "limited precedential effect," 433

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[2] See also *Quern v. Jordan,* 440 U.S. 332, 337 (1979), where the Court cited *Milliken* just after noting that in *Edelman,* 415 U.S. at 667-68, the Court had observed that "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an *ancillary* effect on the state treasury." (Emphasis supplied.)

U.S. at 292, and the Justice's subsequent treatment of *Jumel* in *Pennhurst* shows plainly that he did not read *Milliken* as having overruled *Jumel*.

We find nothing to the contrary in *Papasan, supra*. That was a direct action brought against the Governor of Mississippi and other state officials by a group of disadvantaged school children and certain local school officials who alleged that the Equal Protection Clause was being violated by a "present disparity in the distribution of the benefits from the State's Sixteenth Section [school] lands." 92 L.Ed.2d at 229. Pointing out that the alleged violation was "current" and "ongoing," and stressing that "the essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State," the Court declared itself unwilling to rule out a "remedy to eliminate this current disparity, even a remedy that might require the expenditure of state funds ...." *Id.*, at 230.

The disparity complained of in *Papasan* was that the schools attended by the plaintiff children were receiving school-land funds of only 63 cents per pupil at a time when schools elsewhere in the state were receiving an estimated $75.34 per pupil. Although the plaintiffs claimed that they were not receiving a minimally adequate education, the Supreme Court explicitly declined to try to resolve the issues raised by that claim. Instead, the Court remanded the case for consideration of the following issue: "Given that the State has title to assets granted to it by the Federal Government for the use of the State's schools, does the Equal Protection Clause permit it to distribute the benefit of these assets unequally among the school districts as it now does?" *Id.* at 234.

If it should be decided, on remand of the *Papasan* case, that the Constitution does not permit the "benefit" of the school lands to be distributed unequally, the appropriate remedy would seem to be an order directing the authorities to

recalculate their division of the benefit and to start distributing the benefit in equal shares. Such an order would, to be sure, entail increased payments to the schools that had been receiving only 63 cents per child, but it would necessarily entail a corresponding *decrease* in payments to the schools that had been getting $75.34 per child. The total benefit from the school lands would remain the same; the only change would be in its division. The ancillary effect of the order on the state's treasury would be absolutely nil, except insofar as the state might elect voluntarily to increse appropriations from the general funds of the state for schools suffering a reduction in receipts from Sixteenth Section lands.

That is a totally different situation from the one presented in the case at bar, where the State of Tennessee has been ordered to spend money it would not otherwise have been under any obligation to spend at all. Tennessee, moreover, has been ordered to spend this additional money on the basis of *past* violations of the Constitution—and *Papasan* leaves no room for doubt that "[r]elief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant." 92 L.Ed.2d at 227 (footnote omitted).

This suggests an independent reason why *Milliken v. Bradley* cannot justify the extraordinary relief ordered here. The *Milliken* litigation was begun in 1970, and by the time it reached the Supreme Court (for the second time) in 1977, the State of Michigan, "in a finding no longer subject to review,...[had been] adjudged a participant in the constitutional violations ...." 433 U.S. at 295 (Powell, J., concurring). The case at bar, in contrast, was begun in 1955, and not until 30 years later, in 1985, did the district court find that the State of Tennessee "is a 'constitutional wrongdoer' culpable [and answerable] for the continuing effects of state-imposed segregation ...." 615 F.Supp. at 1142. That finding is, of course, subject to review

here, and we have searched the record of this case in vain for any demonstration that the integration of metropolitan Nashville's schools has been wrongfully impeded by anything the state has done, or has failed to do, in the 1970s or 1980s.[3] The mere fact that Tennessee was a constitutional wrongdoer prior to 1956 does not mean that it was still a constitutional wrongdoer when the district court entered its order 30 years later. As justice Powell wrote more than a decade ago,

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[3] It is true that in 1970 the Tennessee legislature enacted a statute prohibiting boards of education from requiring busing to achieve, in the words of the statute, "a racial balance or racial imbalance in any school." Acts 1970 (Adj. S.), ch. 491, § 2. (That statute was enacted some months before the district court, in what we have described as a "careful opinion," 436 F.2d 856, 859 (6th Cir. 1970), made it clear that under the law as it then stood, "the compulsory bussing of pupils to achieve any sort of mathematically ideal balance is not required by the decisions of the Supreme Court." 317 F.Supp. 980, 990 (M.D.Tenn. 1970).) In an order dated July 15, 1971, the district court adopted a desegregation plan that did require mandatory busing to achieve racial balance. There is no evidence in the record to suggest that the 1970 statute ever had the slightest effect on busing in Nashville.

The work-product of the 1970 Tennessee legislature cannot be fairly evaluated, moreover, without taking into account the fact that the same legislature passed a law providing, among other things, that "[n]o person shall be refused admission into or be excluded from any public school in the state of Tennessee on account of race, creed, color, sex or national origin." Acts 1970 (Adj. S.), ch. 474, § 1.

The district court complains of "numerous official antibusing resolutions," 615 F.Supp. at 1149, including, presumably, House Joint Resolution No. 342, adopted March 22, 1972, where "all members of the Tennessee Congressional Delegation [were] commended for their stand against bussing," and House Joint Resolution No. 376, approved April 19, 1972, formally petitioning the Department of Justice to intervene in pending lawsuits in Memphis, Nashville and Chattanooga pursuant to a recent message in which the President of the United States had said "that the U.S. Department of Justice might intervene in local school cases where school bussing was ordered by the courts in a manner that caused undue hardship and ill will." Whatever one may think of these resolutions and petitions to the na-

> "The principal cause of racial and ethnic imbalance in urban public schools across the country—North and South—is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities." *Austin Independent School District v. United States,* 429 U.S. 990, 994 (1976) Powell, J., concurring in grant of certiorari).

The state did have "an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system,' " *Keyes v. School District No. 1,* 413 U.S. 189, 200 (1973), quoting *Brown v. Board of Education,* 349 U.S. 294, 301 (1955), but in 1956 the Supreme Court of Tennessee struck down all provisions of state law requiring segregation of the races in the public schools, *Roy v. Brittain,* 201 Tenn. 140, 297 S.W.2d 72 (1956), and the old system of *de jure* segregation was completely dismantled in the 1960s. The state's duty in this respect was discharged long before Metro filed its third-party complaint against the state.

Although the state may still have an affirmative obligation to see that the lingering effects of *de jure* segregation are eliminated, the existence of such an obligation does not compel either the conclusion that the state must discharge the obligation directly or the conclusion that the state may assign to its subdivi-

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tional authorities, it is not to be supposed that the Fourteenth Amendment repealed the First; the merits of mandatory busing obviously constitute a legitimate subject for public debate and discussion. We expect our elected representatives to listen to the concerns of the community, and before the third-party defendants were joined as parties in this case an attentive listener would have heard "a white majority of the school board, acting on the advice of a white desegregation expert, recommending to the Court *more* busing to achieve *more* racial balance," at the same time that "the black plaintiff urge[d] upon the Court *less* busing, *more* neighborhood characteristics to the assignment plan, and the permissibility of majority black schools." 492 F.Supp. at 184. Men and women of good will obviously can and do differ on these extraordinarily difficult questions, and this is an area where no one can honestly claim to be certain that the policies he or she favors are the wisest policies.

sions no more than 40% of the cost of discharging it. "Municipal corporations [and metropolitan school boards] are political subdivisions of the State," after all, "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them." *Hunter v. Pittsburgh,* 207 U.S. 161, 178 (1907). In *Brown II,* 349 U.S. 294 (1955), the Supreme Court "held that the primary responsibility for abolishing the system of segregated schools would rest with the local school authorities." *United States v. Montgomery County Board of Education,* 395 U.S. 225, 226 (1969). If the State of Tennessee has chosen to let local school boards pull the laboring oar in attempting to eliminate the consequences of segregation, that is no more an evasion of state responsibility than if the state had chosen to act solely through the State Department of Education. "The very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them'. . . ." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 42 (1973), quoting *Jefferson v. Hackney,* 406 U.S. 535, 546-47 (1972). The record in this case simply does not show that the State of Tennessee is currently a participant in any constitutional violation.

In the post-*Milliken* case of *Green v. Mansour,* 474 U.S. 64, 73 (1985), finally, the Supreme Court held that not even a declaratory judgment may be entered against state officials "when the result would be a partial 'end run' around our decision in *Edelman v. Jordan,* 415 U.S. 651 ...." The *Edelman* decision, as the Supreme Court reiterated in another post-*Milliken* case, *Cory v. White,* 457 U.S. 85, 90 n.2 (1982), "recognized the rule 'that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.' " To read *Milliken* as justifying the order entered in the case at bar would

be to sanction just the kind of "end run" around *Edelman* that *Green v. Mansour* forbids.[4]

II

The order before us represents not only an end run around *Edelman,* but an "end-run around the . . . legislature's allocation of state funds." *United States v. Texas Education Agency,* 790 F.2d 1262, 1265 (5th Cir. 1986), *cert. denied,* 93 L.Ed.2d 828 (1987). Under our tradition of government, that is a very serious matter.

Echoing a provision found in Article I, § 9 of the United States Constitution, the Constitution of the State of Tennessee provides that "[n]o public money shall be expended except pursuant to appropriations made by law." Tenn. Const. art. II, §

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[4] In *Reed v. Rhodes,* 662 F.2d 1219 (6th Cir. 1981), *cert. denied,* 455 U.S. 10-18 (1982), and *Penick v. Columbus Board of Education,* 663 F.2d (6th Cir. 1981), *cert. denied,* 455 U.S. 1018 (1982), this court did affirm judgments ordering state defendants to share in the payment of school integration costs in Ohio. The defense of sovereign immunity was not considered or ruled on in either case, however.

Other circuits appear to be divided as to whether federal courts must defer to the states in determining how school integration plans will be financed. See, *e.g., United States v. Indianapolis Bd. of School Comm'rs,* 677 F.2d 1185 (7th Cir.), *cert. denied,* 459 U.S. 1086 (1982) (state required to pay all costs where state was the sole violator; Eleventh Amendment not implicated because the plaintiff was the United States); *Liddell v. Bd. of Education,* 667 F.2d 643 (8th Cir.), *cert. denied,* 459 U.S. 877 (1982) (affirming order that state pay one-half of cost); *Evans v. Buchanan,* 582 F.2d 750, 774-80 (3d Cir. 1978) (en banc), *cert. denied,* 446 U.S. 923 (1980) (vacating order that imposed a higher school tax rate than the maximum authorized by state legislation); *United States v. Texas Educational Agency,* 790 F.2d 1262 (5th Cir. 1986) *cert. denied,* 93 L.Ed. 828 (1987) (state not required to share costs where it had not been an active party to the litigation since 1970.) None of the court of appeals opinions we have examined can be said to demonstrate convincingly that the Supreme Court's sovereign immunity decisions do not mean what they seem to say.

24. (*Cf.* Tenn. Code Ann. § 9-7-101(a): "No money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law.") These "appropriations," of course, are appropriations made by the state legislature in laws either approved by the governor of the state or passed by the legislature over his veto. Tennessee law thus contemplates that the money raised by the state through taxation of its people is to be expended only as the people themselves direct, in laws enacted by representatives chosen by the people and accountable to them at election time.

The federal judiciary clearly has the duty and the power to prohibit segregation in the schools of Tennessee, but in no way does it follow that the judiciary has any corresponding authority to dictate the specific financial arrangements under which the costs of integrating the schools shall be handled. As long as those costs are in fact paid, we see no justification for an unelected judiciary making policy judgments as to how the tax burden shall be allocated.

To date, at least, the judgment of the Tennessee legislature has been that school integration costs ought not be shifted from the taxpayers of individual school districts to the taxpayers of the state at large. The wisdom of that judgment is doubtless debatable, and our decision in this case may well lead to just such a debate—in the halls of the legislature, which is where the debate belongs. A judgment that 60%—or 10%, 30%, 90% or 100%—of all school integration costs ought to be assumed by the taxpayers at large would obviously be defensible as a matter of policy, and perhaps some such allocation would represent a sounder policy than the one the legislature has thus far chosen to follow. But while we may consider our judgment on such a question superior to the legislature's, we are not free to set the legislature's judgment aside and substitute our own. No matter how desirable we may think a shift in the tax burden would be, the accomplishment of such an end cannot justify resort to unconstitutional means. For us to assume a "legislative role," as

Justice Powell put it in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 31 (1973), would be to assume a role "for which the Court lacks both authority and competence."

In *Milliken I*, where the Supreme Court rejected the judicial creation of a "new super school district" for metropolitan Detroit, the Court said that implementation of that sort of remedy would create a whole host of complex questions, including fiscal and tax questions, with which judges are ill-equipped to deal. 418 U.S. at 743. After noting that "the District Court will become first, a *de facto* 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area," the Court went on to observe that "[t]his is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives." 418 U.S. at 743-44.

The reason that federal judges are not "qualified" or "competent" to resolve these legislative questions is not that they are demonstrably deficient in the skills, talents and wisdom that legislators ought to possess. Many judges now sitting have served very ably in state legislatures or in Congress, and these people did not lose their aptitude for legislating when they assumed the bench. What they lost, rather, was their authority to legislate. The voters can remove a legislative representative from office, but cannot remove a federal judge from the bench; and that, under the American tradition, is a principal reason the legislator has been entrusted with broader authority than the judge.[5]

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[5] The Vermont Constitution of 1777 is instructive in this connection:

> "That those who are employed in the legislative and executive business of the state, may be restrained from oppression, the people have a right, at such periods as they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections." *Id.*, Ch. 1, § VII, as quoted in 4 P. Kurland & R. Lerner, *The Founders' Constitution* 559 (1987).

For a state legislature to enact a 60%-40% split of school integration costs would be totally unexceptionable. The same 60%-40% split ordered by a federal court is another matter altogether. Not only are legislatures accountable to the electorate as courts of law are not, but the acts of a legislature are subject to change or repeal by the people, through their representatives, as acts of a court may not be. It has often been pointed out that when the act of a federal district judge is accompanied by the words "this is what the Constitution requires," the judge (given the concurrence of the appellate courts) has prevented the people's representatives from changing—ever—what he has done, unless the Constitution itself be changed. This is formidable power indeed; it is power that is necessary, to be sure, but because its exercise is not subject to political control and its conclusions are not subject to amendment by ordinary political means, it is power that we must guard against exercising on political questions.

If unelected judges are free to second-guess the people's elected representatives on how the costs of running the schools shall be allocated as between the state and its political subdivisions, may the judiciary also second-guess the people's representatives on what the overall level of costs shall be? Courts were never intended to become the final arbiters in the budgetary process at any level of government, local, state or federal; that is the job of the people's elected representatives. Thus it is that "[t]he consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States ...." *Rodriguez*, 411 U.S. at 58.

In language of majestic simplicity, our Constitution provides that "The United States shall guarantee to every State in this Union a Republican Form of Government ...." U.S. Const. Art. IV, § 4. A "republican" form of government, as Madison suggested in Number Ten of the Federalist Papers, is "a Government in which the scheme of *representation* takes

place." (Emphasis supplied.) In few (if any) areas of government is Madison's "scheme of representation" more important than it is in the area of government finance and taxation. A principal cause of our Revolutionary War, after all, was the imposition of taxes without representation. The concept that "taxation without representation is tyranny" was one for which a number of the Framers had put their very lives on the line. Our Constitution was not adopted to perpetuate the evil that led us to break our ties with the British Crown.

More than a quarter of a century ago the Mayor of Nashville, suing "on behalf of himself and all residents of the City of Nashville, Davidson County", was permitted to join other Tennessee voters in a lawsuit alleging that there had been a "debasement of their votes," in violation of the Fourteenth Amendment, because of a malapportionment of legislative seats among the counties of the state. That lawsuit led to a landmark Supreme Court decision holding that the plaintiff voters had a judicially cognizable interest "in maintaining the effectiveness of their votes." *Baker v. Carr,* 369 U.S. 186, 208 (1962), quoting *Coleman v. Miller,* 307 U.S. 433, 438 (1939). Although the plaintiffs in *Baker v. Carr* did not rely on the specific constitutional guarantee of a republican form of government, and the Supreme Court did not read the plaintiffs' claim as resting on that guarantee, the Court did observe that "[i]t is inconceivable that guaranties embedded in the Constitution of the United States may... be manipulated out of existence." *Id.* at 230, quoting *Frost & Frost Trucking Co. v. Railroad Commission,* 271 U.S. 583, 594 (1926), as quoted in *Gomillion v. Lightfoot,* 364 U.S. 339, 345 (1960). The Supreme Court's vigilance in guarding against the impairment of voting rights has helped give life and substance to the core values embodied in the constitutional guarantee of a republican form of government. "Recognition of 'one person, one vote' as a constitutional principle," it has been said with some authority, "redeems the promise of self-governance ...." Brennan, "My Encounters with the Constitution," *Judge's Journal* 6, 59 (Summer 1987). The

"promise of self-governance" would prove hollow indeed if the right to a meaningful and effective vote were to be manipulated out of existence by the judiciary itself, through decisions tending to debase the people's votes by shifting the legislative power from a body the people can vote for to one they cannot vote for.

III

An obvious rejoinder, it might be thought, is that the State of Tennessee once was—and may still be—a "constitutional wrongdoer," and there is nothing improper about judges directing such wrongdoers to pay for the righting of their wrongs. Again, however, the existence of a duty to eliminate the continuing effects of past racial segregation does not mean that the duty may only be discharged through taxes levied by the state, as opposed to taxes levied by the counties of the state. This "constitutional wrongdoers must pay for their wrongs" argument has little or no force where we are talking about two political entities, a state and one of its own subdivisions, each of which has done wrong (as have subdivisions not now before us), and where the men and women representing the electorate of the state as a whole—an electorate that includes the voters of all the subdivisions—have chosen not to enact legislation shifting to the state as a whole the costs of repairing the wrongs within each subdivision.

Federal courts may not be called upon, in the first instance, "to adjudicate what is essentially an internal dispute between two local governmental entities, one of which is asserting unconstitutional conduct on the part of the other." *South Macomb Disposal Authority v. Township of Washington,* 790 F.2d 500, 507 n.1 (6th Cir. 1986) (Engel, J., concurring). That being so, we do not see how they may be called upon to adjudicate an internal dispute between a local governmental entity and the very state that created it. One of the principles recognized in the great case of *Trustees of Dartmouth College v.*

Woodward, 17 U.S. (4 Wheat.) 518 (1819)—a principle that subsequent decisions have "moved from the area of dicta ... to established federal constitutional law," as the *South Macomb* concurrence notes—is the principle that

> "because municipal bodies are essentially creatures of the state and because the state retains the inherent power to alter, change or even to abolish them in accordance with the state's constitution and laws made thereunder, the United States Constitution simply does not concern itself with matters of internal disagreements between a state and subdivisions created by it ... for this area involves matters which the state is uniquely competent to resolve." 790 F.2d at 507.

Thus it was that in *City of Trenton v. State of New Jersey,* 262 U.S. 182, 192 (1923), the Supreme Court declared that constitutional restraints sought to be invoked by the City of Trenton against its parent state

> "do not apply as against the State in favor of its own municipalities. We hold that the City cannot invoke these provisions of the Federal Constitution against the imposition of the [State] license fee ... here in question."

Citing *City of Trenton,* this court, speaking through Judge Contie, said in *South Macomb* that "a municipal corporation 'cannot invoke the protection of the Fourteenth Amendment' against its own state," at least where that protection is sought to be invoked by the local government body "in its own right." 790 F.2d at 504-05.

If this court were to dismiss the State of Tennessee as a formal party but otherwise affirm the order entered by the district court in the case at bar, the state and its treasury would still be the real third-party defendants. Metro, the third-party claimant, is a political subdivision of the state, and the claim it asserts is asserted by Metro in its own right. A local school board can

have an agency of the state enjoined from taking a step that would tend "to deprive [the local body's] school students of their constitutional right to attend nonsegregated schools," *Akron Board of Education v. State Board of Education of Ohio,* 490 F.2d 1285, 1288 (6th Cir.), *cert. denied,* 417 U.S. 932 (1974); *cf. Washington v. Seattle School District No. 1,* 458 U.S. 457 (1982), but that is not our case. In our case the claimant—an active participant in the same wrongs on which it now bases its claim for indemnification—has sued solely in its own right, just as the claimant in *South Macomb* did, and thus is barred, as the *South Macomb* claimant was, by the principle recognized in *Dartmouth College* and *City of Trenton.*

IV

Even if there were no question of the district court's constitutional authority to act in this case, we should not consider the order before us a defensible exercise of the federal equity power. It is true that judgments of the sort reflected in the order are "inescapably particularistic," but it is hard to quarrel with the generalization that "how the State ... chooses to pay for busing is, at least in the first instance, the business of the State ... rather than the federal courts." *United States v. Board of School Commissioners of City of Indianapolis,* 677 F.2d 1185, 1190-91 (7th Cir.) (Posner, J., dissenting), *cert. denied,* 459 U.S. 1086 (1982). "My contention that the financing issue ought to be left to the state to resolve," Judge Posner went on to explain in that dissent, "derives from the nature of our federal system, which implies that interventions by federal courts into the processes of state government ought to be minimized, but more simply from traditional notions of equity jurisprudence." 677 F.2d at 1191-92. We agree.

The "nature of our federal system" itself suggests that a federal court of equity, in the exercise of its sound discretion, ought to refrain from making policy decisions on the extent to which the financing of local school systems will be assumed by

the taxpayers of the state at large. The one who pays the educational piper generally gets to call the educational tune, as many thoughtful and well qualified observers have argued (see *Rodriguez,* 411 U.S. at 52 n.109)—and as the Supreme Court said in *Milliken I,*

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See *Wright v. Council of the City of Emporia,* 407 U.S., at 469, 33 L.Ed.2d 51. Thus in *San Antonio School District v. Rodriguez,* 411 U.S. 1, 50, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.' " 418 U.S. at 741-42.

For the federal judiciary to take upon itself the job of limiting the degree to which local schools may be locally financed is to assume responsibility for policy decisions likely to have serious ramifications, even if the judiciary's ability to predict the nature of those ramifications is not likely to be very good. Equitable considerations ought to counsel caution here, whether constitutional considerations compel it or not.

The State of Tennessee already does, to be sure, exercise varying degrees of control over different aspects of the operation of the public schools, as authorized by a state constitutional provision declaring that "[t]he General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." Tenn. Const. art. XI, § 12. There is no doubt that Tennessee could, if it wished, abolish every local school district in the state and make every school a state school

pure and simple, operated directly by the state and paid for directly by the state. Tennessee has not gone that far, however; it has chosen to "provide for the maintenance, support and eligibility standards" by allowing the public schools to be operated by local school boards, subject to certain state-set standards, and to be financed primarily by local tax dollars, as supplemented by state aid in amounts determined under formulas adopted by the state legislature. Primary responsibility for funding has been delegated to the counties: "The duties of the county legislative body shall be ... to provide necessary funds to enable [the] county board [of education] to meet all obligations under the adopted budgets ...." Tenn. Code Ann. § 49-2-101. The mere fact that the state legislature *may* go farther than it has in controlling and paying for the schools hardly means that the federal courts, in the exercise of their equitable powers, ought to tell the legislature what it *must* do in this respect.

The fact that desegregation programs must be paid for by one group of taxpayers or another tells us nothing as to who those taxpayers shall be, and we know of no rule of equity capable of explaining why the state legislature's judgment on such a question ought not be respected by the federal courts. As recently as 1980, interestingly enough, the district court explained that the Metropolitan Government, the Metropolitan Mayor, and the members of the Metropolitan Council had been joined as defendants in this litigation nine years earlier "since *they* controlled the purse strings from which money for increased transportation must come." 492 F.Supp. at 172 (emphasis supplied). Now, long after *de jure* segregation has been abolished, the district court concludes that the state has a "nondelegable duty to participate" in paying the cost of local school desegregation. 615 F.Supp. at 1148. The extent of that "nondelegable" duty of fiscal "participation," it turns out, is 60%—a degree of participation for which the district court's opinion provides no rationale whatever.

To say that no more than 40% of the burden of paying for the integration of the Metro schools may be delegated to the Metro taxpayers is to voice a conclusion, not to give an intelligible reason for that conclusion. Nothing in the district court's opinion explains why the elected representatives of all the people of Tennessee should not be free to delegate to the taxpayers of each school district the burden of paying 100% of the cost of court-ordered programs designed to eliminate any vestiges of segregation in that district. In the absence of any such reason, we can only conclude that the district court abused its equitable power in ordering that Metro be indemnified for 60% of its integration costs.

Courts of equity, moreover, do not leave their doors open to prospective suitors forever. Metro and its predecessors failed to assert any claim against their parental joint tortfeasor until a decade after busing was ordered and a quarter of a century after this lawsuit was begun. We find it extremely difficult to reconcile the order appealed from with the policy considerations on which the equitable doctrine of laches is based.

Under traditional notions of equity jurisprudence, finally, equitable remedies imposed in consequence of a violation of the law may "extend no farther than required by the nature and the extent of that violation." *General Building Contractors Ass'n, Inc. v. Pennsylvania,* 458 U.S. 375, 399 (1982). The judicious application of this "core principle," as Justice Powell called it in *Austin Independent School District v. United States,* 429 U.S. 990 (1976) (Powell, J., concurring), is particularly important when it is proposed that the remedial powers of the federal courts be exercised "to restructure the operation of local and state governmental entities." *Hills v. Gautreaux,* 425 U.S. 284, 293 (1976). "[W]here mandatory segregation by law of the races in the schools has long since ceased, [it is the duty of the courts] to first determine whether there was any action ... which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff." *Dayton Board of Education v. Brinkman,*

433 U.S. 406, 420 (1977). "[L]ocal autonomy of school districts is a vital national tradition" [citations omitted], so "the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles" *Id.* at 410.

Here, as in *Dayton,* "mandatory segregation by law ... has long since ceased." The district court has nonetheless displaced the judgment of the elected representatives of the people of Tennessee—displaced their judgment not on the question of whether segregation shall be permitted, but on the question of how the cost of eliminating its lingering consequences shall be defrayed. We would be hard put to explain why that "displacement" of the people's representatives is not, in substance, the judicial counterpart of a declaration of marital law. It comes, in this case, long after hostilities have ceased, and it is "justified" by no "reasoned statement of legal principles" explaining why the imposition of mandatory segregation by past generations should deprive this generation's representatives of the power to decide for themselves how the cost of righting that great wrong shall be borne. It is simply not equitable for the court unilaterally to rearrange the tax burdens of the people of Tennessee without setting forth a principled basis for doing so.

The district court's order requiring the state to pay 60% of Metro's desegregation costs is REVERSED, and the case is REMANDED to the district court with instructions to dismiss the State, the state school board, and the state officials as third-party defendants.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-5837/8

Robert W. Kelley, et al.,
Plaintiffs,

v.

Metropolitan County Board of Education of
Nashville and Davidson County, Tennessee, et al.,
Defendants-Third Party Plaintiff-Appellees,
Cross-Appellants,

v.

State of Tennessee, et al.,
Third Party Defendants-Appellants,
Cross-Appellees.

ORDER

(Filed: March 15, 1988)

BEFORE: ENGEL, NELSON and RYAN, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 85-5837/5838

Robert W. Kelley, et al.,
Plaintiffs,

vs.

Metropolitan County Board of Education of
Nashville and Davidson County, Tennessee, et al.,
Defendants-Third Party Plaintiffs-Appellees,
Cross-Appellants,

State of Tennessee, et al.,
Third Party Defendants-Appellants,
Cross-Appellees.

ORDER

(Filed: March 28, 1988)

Upon consideration, it is ORDERED that the motion to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed until 30 days from the file date of this order.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Chief Deputy

APPENDIX D

Robert W. Kelley, et al.,

v.

Metropolitan County Board of Education of Nashville & Davidson County, Tennessee, et al.,

v.

State of Tennessee; Lamar Alexander, Governor of the State of Tennessee; Robert L. McElrath, Commissioner of Education; and State Board of Education.

Nos. 2094, 2956.

United States District Court,
M.D. Tennessee,
Nashville Division.

Aug. 14, 1985.

In school desegregation action, city and county sought injunction prohibiting State from continuing to refuse to participate in desegregation process and ancillary orders directing State to provide funds to assist city and county in carrying on desegregation plan ordered by the court. The District Court, Wiseman, Chief Judge, held that: (1) state officials would be enjoined from further refusing to carry out their affirmative, continuing duty to eliminate vestiges of segregation, and (2) pursuant to injunction, State would be ordered to assume 60% of costs of desegregation program.

Motion granted.

MEMORANDUM

WISEMAN, Chief Judge.

The City of Nashville and surrounding Davidson County have struggled with desegregation since 1956. Social and political turmoil created by the issue have made the process par-

ticulary arduous — and in recent years expensive. Between 1971 and 1982, Metropolitan Nashville and Davidson County [Metro] spent approximately $20,000,000 to desegregate its public schools, with an estimated annual recurring cost (as of 1982) of $6,000,000.

Until today, Metro Nashville has gone it alone. The State of Tennessee has viewed desegregation strictly as a local matter. The Court now rules that State officials shall be enjoined from further refusing to carry out their affirmative, continuing duty to eliminate the vestiges of segregation which Tennessee's own constitution, statutes, policies and practices created and maintained during the last one hundred years. Pursuant to the injunction, the court orders the State to assume sixty percent (60%) of the costs of the desegregation program in Metropolitan Nashville and Davidson County.

The Court grants the motion for partial summary judgment of third party plaintiff Metropolitan County Board of Education of Nashville and Davidson County. Fed.R.Civ.P. 56.

Jurisdiction

[1, 2] The Court proceeds under 28 U.S.C. §1343 and 2201 to adjudicate issues arising under the Civil Rights Acts, 42 U.S.C. §1983 and 1985. The Eleventh Amendment does not bar the action since third party plaintiffs seek to enjoin state officials from refusing to conform their conduct to well-established constitutional standards. *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The Court is vested with legal authority to decide the merits of the claims against these officials and to issue such ancillary orders as equity deems necessary to enforce the injunction. *Bradley v. Milliken,* 540 F.2d 229, 245-46 (6th Cir. 1976), *aff'd,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977).

Facts

This case has proceeded before this Court since 1956. The facts are long and detailed. For purposes of the current issue,

the Court confines its consideration to the conduct of state and county officials in carrying out the mandate of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), which ordered the end of state-imposed segregation and directed states to desegregate public schools "with all deliberate speed."[1]

The issue presented is whether the undisputed facts demonstrate that the State of Tennessee is a "constitutional wrongdoer" culpable for the continuing effects of state-imposed segregation and is therefore subject to an injunction and ancillary order directing the State to share in the costs of desegregating Metro schools.

The Thirteenth, Fourteenth and Fifteenth Amendments represent the end of a century of slavery throughout the South. Despite Congress' enactment of the Civil Rights Acts, 42 U.S.C. §1981, *et seq.*, to protect blacks against unfair treatment by state officials and to assure them the rights and privileges guaranteed to all persons within the United States, enforcement of the *Jim Crow* laws through the mid-1960's diminished the rights of blacks, segregating them from other American citizens and limiting their opportunities to obtain quality education, housing, and medical care.

In 1954 the Supreme Court, recognizing the inequitable position of the nation's minorities, declared an end to the "separate, but equal" policies practiced by many states. *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). In 1955, Chief Justice Warren, speaking for the Court in *Brown v. Board of Education,* 349 U.S. 294, 299-301, 75 S.Ct. 753, 755-756, 99 L.Ed. 1083 (1955) (Brown II), directed school authorities to devise and implement policies to assure the

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[1] A more detailed review of the history of this case appears in an earlier opinion by this Court. *See Kelley v. Board of Education,* 492 F.Supp. 167 (M.D.Tenn. 1980).

admission of all students to public schools on racially non-discriminatory bases at the earliest practicable date.

The *Brown* decision had an immediate impact in Tennessee. At the time *Brown* was decided, the Tennessee Constitution mandated separation of the races in public schools. Article XI §12 provided in relevant part:

> No school established or aided under this section shall allow white and negro children to be received as scholars in the same school.

The Tennessee Supreme Court struck down the provision as unconstitutional in 1956. *Roy v. Brittain,* 201 Tenn. 140, 297 S.W.2d 72 (1956). The State of Tennessee held four constitutional conventions between 1959 and 1978. Despite the *Brittain* Court's ruling, the provision was not removed from Tennessee's official books until the fourth convention in 1978.

The *Brown II* directive created great apprehension throughout many communities. Local school boards were particularly concerned about their responsibility to desegregate schools. In response to numerous requests for advice and direction, Attorney General George McCanless issued an opinion letter defining the State's legal responsibility in implementing the *Brown II* mandate and that of the local school boards. The June 16, 1955, letter states:

> Under the Code of Tennessee the management of the public schools is solely the business of the local school boards. These boards, within the limits of applicable law, determine all of the local school problems. This has been the law since the origin of the public school system in Tennessee and is the law today. Under this state of the law it is the responsibility of each local school board to determine for itself the way in which it is going to meet the problem of desegregating the schools under its jurisdiction.

Each board must determine for itself, in light of all existing applicable circumstances, (physical, fiscal, sociological, transportation problems, etc.) when, where, how and to what degree, the schools under its jurisdiction are to be desegregated. This imposes upon each board the duty of considering for itself its own course of action.

Local school boards which are sued by negroes seeking admission to schools under their jurisdiction must be prepared to defend their own action determining the manner in which their school shall be desegregated. It will be necessary for legal counsel for defense of such suit to be provided by the county, the city, or special school district involved. While the office of the Attorney General is aware of the problems that will confront the school boards and is sympathetic with their problems, the office can do no more than to advise with representatives of the boards with respect to these problems as they arise. Under the Constitution and the statutes of Tennessee, the office of the Attorney General is limited to representation of the state and of state officials with respect to state revenue and other state matters. Counties, cities, and special districts have always been required by law to provide their own legal counsel in matters affecting them, and this has not been changed because of the desegregation opinion; however, within the limits of our ability and to the extent permitted by the most favorable interpretation of the statutes defining and regulating our duties, we stand ready to furnish such advice and guidance as under the circumstances we can.

While, as indicated above, the State Department of Education has no legal responsibility to determine the manner in which the segregation problem will be dealt with in each school district, there is much the Department can do by way of correlation of information and other things which will occur to you as the responsible head of that Depart-

> ment. As a result of conferences with you I know that you intend to have the Department of Education do all that it can within the framework of existing law to assist local schools in the solution of their heavy and vexing problems.

The McCanless opinion letter established the State's policy to keep out the politics of desegregation, leaving local communities to grapple with the issue. The State asserts in its brief that the McCanless letter represents the State of Tennessee's policy on desegregation which continues today. Third Party Defendant's Motion for Summary Judgment, Memorandum at 7 (filed December 19, 1984).

The plaintiffs in this case filed their complaint on September 23, 1955. The State was not named as a defendant.

Despite General McCanless' 1955 statement that desegregation was purely a "local school problem," in January of 1957, the Tennessee legislature passed the parental preference statutes permitting "voluntary segregation" of the races in public schools. T.C.A. §49-3704 (1957); *see* Transcript of Debate on House Bill 29 (1957), Exhibit D, Third Party Plaintiff's Motion for Summary Judgment (filed 12-19-84). In September of 1957, this Court struck down the parental preference statutes; the holding later was affirmed by the Sixth Circuit. *Kelley v. Board of Education,* 270 F.2d 209, 230 (6th Cir.), *cert. denied* 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240 (1959). Ignoring the ruling, in December of 1957, the Nashville School Board submitted a desegregation plan to this Court grounded on the parental preference statute and the principles of "voluntary desegregation." This Court disapproved of the plan.

In 1960, a separate suit was filed seeking the desegregation of Davidson County schools. Subsequently, in 1963, that suit was consolidated with the original Nashville desegregation suit.

In 1971, Judge Morton entered a comprehensive order directing the desegregation of Metro Nashville and Davidson County

schools. *Kelley v. Board of Education,* Nos. 2094, 2956, at 6 (M.D.Tenn. June 28, 1971); *see also Kelley,* 492 F.Supp. 167 (M.D.Tenn. 1980). The order constitutes a watershed event in this litigation, finding that the separation of races in the public schools was the result of a policy of de jure segregation. *See Kelley v. Board of Education,* 687 F.2d 814, 815-16 (6th Cir. 1982). During 1971, this Court increasingly became concerned over Metro's "half hearted" efforts to devise and implement an effective program to desegregate its public schools. *See* 492 F.Supp. 167, 171. Ultimately, the Court found Metro to have failed to act in good faith. *See* 687 F.2d at 816.

While Metro dragged its feet, the State of Tennessee did nothing to facilitate the desegregation process. In 1972 the legislature passed a bill providing that if a local school board voluntarily adopted a transportation plan aimed at achieving racial balance, the governor was authorized to order the withholding of all state funds from the local school board. T.C.A. §49-6-2101(f) (1983). This is the law today. During the early 1970's, State officials also adopted a number of anti-busing resolutions.

The State of Tennessee along with a number of State officials were joined as defendants in this case in 1981. Twenty-six years had elapsed since the filing of the original complaint, and ten years from Judge Morton's entry of the 1971 comprehensive order. The Metropolitan County Board of Education of Nashville and Davidson County, Tennessee now seek (1) an injunction prohibiting the State from continuing to refuse to participate in the desegregation process and (2) ancillary orders directing the State to provide funds to assist Metro in carrying on the desegregation plan ordered by this Court.

Issues

The State asserts three principal propositions which they argue preclude issuance of the relief sought by the third party plaintiffs.

1. The State is not now and has not been a "constitutional wrongdoer." That is, the State claims that it has committed no post-*Brown* acts that have adversely affected desegregation in Nashville. Moreover, the State claims that the exercise of federal jurisdiction over Nashville and Davidson County schools has made State intervention into the local desegregation program inappropriate and, as such, has absolved the State of any affirmative duty that may have required them to participate in the elimination of vestiges of state-imposed segregation.

2. The Eleventh Amendment bars the award of retrospective or prospective relief against the state.

3. Plaintiffs are barred from relief by operation of both the statute of limitations to the equitable doctrines of laches and unclean hands.

Discussion

A. The State of Tennessee is Obliged to Eliminate the Vestiges of State-Imposed Segregation.

The State of Tennessee asserts that it cannot be held responsible for the costs of desegregating Metro schools because, although admittedly a historical force imposing mandatory segregation, it has been innocent of any culpable conduct since the 1954 decision in *Brown*. The State argues that only upon a showing of "direct impact" of its policies or practices — either in maintaining segregation or in inhibiting the desegregation efforts — can the State be implicated and thereby held responsible for desegregating Nashville's schools.

[3, 4] This Court views the State's responsibility quite differently from the view adopted by state officials. A state is obliged to do more than merely abandon its prior discriminatory conduct. *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 538, 99 S.Ct. 2971, 2979, 61 L.Ed.2d 720 (1979) (Dayton II). A state which initially creates a dual system of education for its citizens has a continuing, affirmative

duty to eradicate all the lingering effects of its pro-segregation efforts. *Reed v. Rhodes,* 500 F.Supp. 404, 424 (N.D.Ohio 1980), *aff'd* 662 F.2d 1219 (6th Cir. 1981) *cert. denied,* 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982); *United States v. State of Missouri,* 363 F.Supp. 739, 747 (E.D.Mo. 1973), *aff'd in relevant part,* 515 F.2d 1365 (8th Cir. 1975), *cert. denied,* 423 U.S. 951, 96 S.Ct. 374, 46 L.Ed.2d 288 (1975); *Liddell v. Board of Education of City of St. Louis,* 491 F.Supp. 351, 359 (E.D.Mo. 1980) 667 F.2d 643 (8th Cir.), *cert. denied* 454 U.S. 1081, 102 S.Ct. 634, 70 L.Ed.2d 614 (1981) (subsequent citation history omitted). Contrary to the position of the State, when it became necessary for this Court to step in and supervise the dismantling of the dual system, the presence of the Court did not end the obligation of the State to participate in eliminating segregation — it merely limited the State's discretion in directing the overall process. The limitation did not release the State from its constitutional and statutory duty to end the discriminatory system it had created and maintained for a significant period of time and to take affirmative steps to remedy the debilitating effects that resulted from the system.

B. The Eleventh Amendment Permits this Court Both to Enjoin Tennessee Officials from Refusing to Perform Their Constitutional Duties and to Issue Appropriate Ancillary Orders Aimed at Assuring Compliance.

1. *The "Prospective Compliance" Exception to the Eleventh Amendment*

[5, 6] "The Eleventh Amendment does not prevent enforcement of the Fourteenth Amendment...." *United States v. Board of Education of the City of Indianapolis,* 503 F.2d 68, 82 (7th Cir. 1974), *cert. denied* 421 U.S. 929, 95 S.Ct. 1654, 44 L.Ed.2d 86 (1975); *Bradley v. Milliken,* 540 F.2d 229, 244 (6th Cir. 1976), *aff'd* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). Federal courts are empowered to enjoin state officials from acting in a manner that violates federal constitutional or statutory

law or from failing to carry out an affirmative duty imposed under federal constitutional or statutory provisions. *Ex parte Young,* 209 U.S. at 160, 28 S.Ct. at 454. As discussed below, the undisputed facts presented before the Court establish as a matter of law that state officials have failed to carry out their affirmative legal obligation to eradicate the lingering effects of state-imposed segregation and are therefore liable for a continuing violation of the Fourteenth Amendment rights of the black citizens of Metropolitan Nashville and Davidson County. The Court deems it appropriate to issue an injunction enjoining state officials from further refusing to carry out their affirmative obligations and to issue such ancillary orders as are necessary to ensure proper compliance with the injunctive relief ordered.

[7, 8] Well established principles of federal law recognize the authority of this Court to issue the ordered relief. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign state.

The Amendment constitutionalizes the doctrine of sovereign immunity of the states, imposing a constitutional limitation on the federal judicial power established under Article III of the Constitution. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, ____, 104 S.Ct. 900, 906, 79 L.Ed.2d 67, 77 (1984). In the absence of a state's consent, federal courts may not entertain suits against a state or one of its agencies or departments, or against a state official when the state is the "real substantial party in interest." *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945).

[9] Third party plaintiff's claims against the State of Tennessee would be lost but for the saving grace of *Ex parte Young,*

209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In *Young*, the Supreme Court recognized the "prospective-compliance" exception to the jurisdictional bar of the Eleventh Amendment, permitting federal courts to enjoin ongoing conduct by a state official that is in violation of federal law. The "fiction" of *Young* holds that a state may not authorize an unconstitutional action by its officers. Hence, for Eleventh Amendment purposes, a state official is stripped of his official status and subject to the consequences of his conduct when he acts in an unlawful manner. *Ex parte Young*, 209 U.S. at 160, 28 S.Ct. at 454.[2]

2. *Tennessee Officials Continue to Fail to Discharge the State's Duty to Assure the Desegregation of Metro Schools*

The State of Tennessee argues that this Court lacks authority to order injunctive relief against the State because none of its officials currently is acting in violation of federal constitutional or statutory law. The State admits that although prior to *Brown* the State mandated strict separation of the races in public schools, presently no officials are acting in a matter to intentionally foster such segregation. The State argues further that the duty to desegregate schools and to eliminate the lingering effects of past discrimination is solely an issue of local county concern and, as such, the State has no present, affirmative duty to participate in Metro's desegregation program. The State relies on the recent decision in *Banas v. Dempsey*, 742 F.2d 277 (6th Cir. 1984), *cert. granted, sub nom., Green v. Mansour*, ____ U.S. ____, 105 S.Ct. 1863, 85 L.Ed.2d 158 (1985), for the

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[2] Justice Stephens speaks of the *Young* fiction as a "well-recognized irony" since an official's unlawful conduct constitutes "state action" under the Fourteenth Amendment but not "state action" under the Eleventh Amendment. *Florida Department of State v. Treasurer Salvors, Inc.*, 458 U.S. 670, 685, 102 S.Ct. 3304, 3315, 73 L.Ed.2d 1057 (1982) (Stephens, J., plurality opinion). *See also Banas v. Dempsey*, 742 F.2d 277, 284 n. 12 (6th Cir. 1984), *cert. granted, sub nom., Green v. Mansour*, ____ U.S. ____, 105 S.Ct. 1863, 85 L.Ed.2d 158 (1985).

proposition that in the absence of ongoing unlawful conduct, federal district courts have no basis on which to issue an injunction since the requisite facts (warranting the *Young* prospective compliance exception to the jurisdictional bar of the Eleventh Amendment) are no longer present. *Id.* at 286-87.

[10-13] *Banas* was a class action alleging that the State of Michigan wrongfully had denied certain AFDC recipients benefits by refusing to permit deductions appropriate under federal law. After the suit was filed, but before the district court ruled on the plaintiff's motion for a preliminary injunction, Congress amended the Social Security Act, 42 U.S.C. §602(a), with the result that Michigan's actions, though improper under former law, became legal. The *Banas* court held that the Eleventh Amendment barred the court from issuing any order requiring notice of any possible past unlawful state conduct to the putative classes. Congress' amendment of the Social Security Act legitimized Michigan's actions, eliminating the possibility for prospective relief in the suit. As a result, the plaintiffs' claims were only for relief for past harm — and therefore barred. The Eleventh Amendment prohibits "the award of an accrued monetary liability" which represents "retroactive payments." *Edelman v. Jordan,* 415 U.S. 651, 663-64, 94 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662 (1974). That is, federal courts may only issue prospective relief against a State or its officials; principles of sovereign immunity preclude the award of relief for past wrongs. This Court finds that the undisputed facts demonstrate that State officials continue to deny their responsibility to participate in Metro's "local problem" of desegregation. For purposes of *Banas,* this refusal constitutes ongoing unlawful conduct — conduct which this Court has the power to enjoin. The Court is empowered to order the State to share in the prospective costs of desegregation; however, the Eleventh Amendment prohibits a retroactive award for costs already sustained by Metro. The order is made effective from March 16, 1981, the date on which the motion to implead third party defendants was filed.

a. *Public Education is Primarily a State Function; Therefore, Desegregation Requires the Formulation and Implementation of State Public Policy*

Contrary to the opinion of Attorney General McCanless, segregation in county schools is not merely a local problem. Public education is a state function, involving a delegation to local officials the duty to administer the details of daily operations.

> Since the inauguration of the present system of [Tennessee] public schools, in 1873, it has never been even suggested that the state and counties may have different systems and schools, the state operating a state school, and the county a county school, but the basic idea is that the county may supplement the state funds, so as to enlarge and improve the state schools. . . . We are of the opinion that the legislature . . . may as well establish a uniform system of schools and a uniform administration of them, as it may establish a uniform system of criminal laws and of courts to execute them. The object of the criminal laws is, by punishment, to deter others from the commission of crimes, and thus preserve the peace, morals, good order, and well-being of society; and the object of the public-school system is to prevent crime, by educating people, and thus, by providing and securing a higher state of intelligence and morals, conserve the peace, good order, and well-being of society. The prevention of crime, and preservation of good order and peace, is the highest exercise of the police power of the state, whether done by punishing offenders or educating the children.
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> * * * * * * *
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> [T]he schools, in which are educated and trained children who are to become rulers of the commonwealth, are matters of state, and not local, jurisdiction; that in such matters the state is a unit, and the legislature a source of

> power; that the establishment and control of public schools is a function of the general assembly, both under the constitution and because it is a matter of state concern. . . . Power thus asserted is exercised in a manner which is not of common right, but which concerns institutions founded and fostered by the state. The regulation, in its entire scope, relates exclusively to the enjoyment of the privilege afforded a system of education created and maintained by the state for the general good, and it must follow that the state does have power to make the regulations effective by prescribing the method which shall be pursued by those who seek to enjoy the privilege it has created. Certainly, no one will deny the existence of such a right, and, if it does exist, it must reside in the law making power of the state.

Leeper v. State, 103 Tenn. 500, 53 S.W. 962 (1899) (upholding as constitutional the Tennessee Uniform Textbook Act). The *Leeper* court's analysis of the state's authority over public schools is as valid today as when it was spoken at the turn of the century.

The Tennessee Constitution establishes the State's central role in public education.

> EDUCATION'S INHERENT VALUE—PUBLIC SCHOOLS—SUPPORT OF HIGHER EDUCATION. — The State of Tennessee recognizes the inherent value of education and encourages its support. *The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools.* The General Assembly may establish and support such post secondary educational institutions, including public institutions of higher learning, as it determines.

(emphasis added). Tennessee Const. Art. XI, §12 (amended March 31, 1978). Title 49 of the Tennessee Code addresses public education within the State of Tennessee. Its thirteen

chapters illustrate the control state officials exert over local school matters. For example, the State regulates teacher compensation and advancement under the "master teacher" program; it approves the location of new school facilities, and frequently prescribes the curriculum offered in schools.

Counties do not operate their own, autonomous schools; rather, local districts operate state schools at the direction and for the benefit of the state, serving those children who reside within their jurisdictional boundaries. Matters which affect the educational milieu in a local school district are matters of state concern. Desegregation certainly is one such matter. General McCanless' opinion letter declaring the State shall stay out of the "local problem" of desegregation establishes a policy to delegate fully the State's responsibility to formulate and achieve a solution.

b. *The State Deliberately Has Refrained From Participating in the Desegregation of Public Schools.*

[14, 15] The State has the nondelegable duty to participate in the desegregation of local schools. State officials have abdicated that duty. The violation continues today. Placing all consideration of the State's post-*Brown* conduct aside, this Court believes that State action prior to 1954 — in mandating strict separation of the races in public schools — serves, in and of itself, as a sufficient basis on which to find the State responsible for eliminating the continuing effects of racial discrimination. The decision by Tennessee to cease its official discrimination against blacks in light of *Brown* did not eliminate the debilitating effects created by generations of segregation. The effects continue today. *Milliken v. Bradley*, 433 U.S. 267, 287-88, 97 S.Ct. 2749, 2760-61, 53 L.Ed.2d 745 (1977) ("[p]upil assignment does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures").

There exists numerous post-*Brown* acts, however, that demonstrate the State's refusal to discharge its duty to par-

ticipate in the desegregation of Metro schools. The Sixth Circuit Court of Appeals has set forth a five-part test for determing whether a state has intentionally supported a segregated schools system. In *Penick v. Columbus Board of Education,* 583 F.2d 787, 818 (6th Cir. 1978), *aff'd* 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979), the court remanded the case to the district court to make more detailed findings of fact concerning:

1. The State School Board's knowledge (if any) of the [local school board's] intentional segregative practices;

2. The State Board's failure to protest or restrain [the local board] by withholding funds,

3. The State Board's continuance of support in face of such knowledge,

4. The motivation of the State Board in failing to investigate the reasons for de facto segregation, and

5. The effect of findings, if any, under 1, 2, 3 and 4.

Applying the *Penick* test to the undisputed facts presented by the parties the Court makes the following findings: following the original decision in *Brown,* the local boards looked to the State Department of Education for guidance, only to be rebuffed and cast adrift by Attorney General McCanless' letter of June 16, 1955. Faced with the Supreme Court mandate to desegregate its public schools, the State abdicated its responsibility, placing the onus upon each individual school district. Rather than coordinating, the State created chaos. General McCanless was correct in stating "[The local school boards], within the limits of applicable law, determine all of the local school problems." That is to say, the local school boards could do whatever they desired so long as their actions comported with state law on the subject. For example, a local school district currently faced with the "local problem" of segregated schools may voluntarily pursue a desegregation policy so long as the program does not "use or authorize the use of any school

transportation facility for the purpose of achieving a racial balance . . . in any school by requiring the transportation of any student or pupil from one school to another or from one school district . . . to another." T.C.A. §49-6-2101(f)(1). Statutory prohibition of the principal remedial approach to desegregation of public schools illustrates the State's involvement in the "local" issue of desegregation.

More fundamentally, however, this Court does not believe that state-imposed segregation is merely a "local school problem." Mandated by the Tennessee Constitution and regulated by Tennessee statutes, the dual system of public education was wholly a product of State-inspired segregation. General McCanless' opinion letter established the State's "hands off" policy. Yet, what the State characterizes as a federalism-based respect for the jurisdiction of the United States District Court, the Court views as a failure to discharge the affirmative responsibility to participate in devising and implementing an effective remedy. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 861, 6 L.Ed.2d 45 (1961) ("[n]o State may abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be.").

Acknowledging the less than good faith efforts of Metro preceding the 1971 order, the Court nevertheless believes that the State's failure to assume a strong leadership role promoting desegregation has delayed the efficient implementation of desegregation plans throughout the State and has fueled the intransigent attitudes held by many local school boards. Although the Tennessee Supreme Court struck down the Tennessee constitutional provision mandating separation of the races in public schools in *Roy v. Brittain*, 201 Tenn. 140, 297 S.W.2d 72 (1956), the State maintained the provisions on its books until 1978. While the State had no authority to enforce the provisions, the continued publication may be construed as an official statement of State policy on the issue of desegregation. The 1957 parental

preference statutes, the statutory prohibition on voluntary busing and the numerous official antibusing resolutions reaffirm the State's lack of commitment to eliminate the vestiges of discrimination in Tennessee.

The State was aware of the segregated conditions in Metro schools and of Metro's resistance throughout the 1960's to desegregation. The State did not protest nor threaten sanctions, but continued for fund Metro and to pass legislation consistent with Metro's obstructionist spirit. The State, like Metro, simply did not want to desegregate Metro schools through a busing remedy. Following a policy of abdication, the State has been free to set up as many hurdles as possible to disrupt those school districts either required by federal court order or voluntarily choosing to desegregate their schools.

The Court concludes that the State of Tennessee has failed to acknowledge its duty imposed under *Brown* and that State officials continue to refrain from discharging their constitutional obligation to participate in the elimination of the vestiges of state-imposed segregation. *See Liddell v. Board of Education of City of St. Louis,* 491 F.Supp. at 359 ("[i]n sum, the State defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty.").

3. *Federal Courts Frequently Have Applied the "Prospective Compliance" Exception to School Desegregation Cases and Have Ordered States to Share the Costs of Desegregation Plans.*

[16, 17] "A state which initially compelled or authorized the creation of a local dual system has a continuing affirmative duty to eradicate all lingering effects of segregation; the neglect of that constitutional duty renders the state liable." *Reed v. Rhodes,* 500 F.Supp. 404, 424 (N.D.Ohio 1980), *aff'd* 662 F.2d 1219 (6th Cir. 1981), *cert. denied* 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1092). "[T]he primary responsibility for insuring a constitutional structure of public education is the state's,

. . . it is appropriate for the Court to order the State to affirmatively participate in remedial efforts . . . including the provision of funding, to the extent necessary, for desegregation ordered by the Court. *Liddell v. Board of Education,* 491 F.Supp. at 360. In *Reed,* the Ohio State Attorney General and state statutes mandated that the state school board participate in the desegregation of local schools. The school board was found to have failed to do so and, in the light of its post-*Brown* conduct, was held to have violated the rights of the plaintiffs. The State was ordered to share in the costs of desegregation.

[18] This Court, having determined that State officials are in violation of federal law, has the power to enjoin the continuation of the conduct and to order the State to share in the desegregation costs.

> [I]n the event of a constitutional violation all reasonable methods [are] available to formulate an effective remedy, "and that effort should be made by a federal court to employ those methods to achieve the greatest possible degree of relief, taking into account the practicalities of the situation. . . . Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

Hills v. Gautreaux, 425 U.S. 284, 297, 96 S.Ct. 1538, 1546, 47 L.Ed.2d 792 (1976). Reviewing the operations of the state school board in *Penick v. Columbus Board of Education,* 663 F.2d 24, 26 (6th Cir. 1981), the Sixth Circuit Court of Appeals noted that unlike the other activities of the school board, the board operated under a "hands-off" policy with respect to school desegregation. The court found that the state had failed to exercise its power to facilitate the dismantling of the state-created segregated systems and that the "incremental effect of the State Board's action and inaction [was] the total failure of compliance with the constitution and laws of the United States

and of Ohio in the performance of the duty to eliminate racial segregation in the Columbus school system." The circuit court affirmed the district court's order directing the state to share in the loss of desegregating Columbus schools. *See also United States v. Indianapolis Board of School Commissioners,* 677 F.2d 1185 (7th Cir.), *cert. denied,* 459 U.S. 1086, 103 S.Ct. 568, 74 L.Ed.2d 931 (1982) (ordering State to pay the entire cost of desegregating Indianapolis schools).

[19] While a state's failure to act, in and of itself, may be insufficient to support a finding of liability against a state, *see Reed v. Rhodes,* 500 F.Supp. at 423 (citing cases), the undisputed facts presented by the parties in this case support the finding that the creation and maintenance of the segregated school systems in Metro Nashville and Davidson County are the result, in part of the intentional conduct of the state officials. *See Dayton Board of Education v. Brinkman,* 433 U.S. 406, 413, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977). The culpability of the State's inaction is compounded by its active campaign against busing. Such conduct has been counter-productive to the desegregation efforts of local administrators and parents.

The State's conduct in attempting to undermine the efforts of Metro Nashville and Davidson County is to be distinguished from those cases in which the state was held not liable for the segregated conditions in local schools. In *Alexander v. Youngstown Board of Education,* 454 F.Supp. 985, 1074 (N.D.Ohio 1978), *aff'd,* 675 F.2d 787 (6th Cir. 1982), the court held that because the *local* school board was held not liable for intentionally segregating its schools, the state could not be liable. Ohio officials' failure to investigate and act on information concerning racial imbalances, while supporting the inference of intentional segregation, was held not to be a sufficient basis for liability in light of the state's other affirmative actions in attempting to secure the desegregation of the Youngstown schools. *Id.* Similarly, in *Arthur v. Nyquist,* 573 F.2d 134 (2d Cir.) *cert. denied,* 439 U.S. 860, 99 S.Ct. 179, 58 L.Ed.2d

169 (1978), the State of New York was held not liable for the segregated conditions in Buffalo schools. In that case, the Commissioner of the Board of Education issued a policy statement on desegregation directing local school districts to eliminate dual systems and threatening to withhold funds for those districts failing to comply. The commissioner's subsequent failure to withhold funds from recalcitrant school districts ultimately was held to be prudential in light of legitimate policy concerns over unduly disrupting schools. *Id.* at 146.

In comparison, in this case, the State did nothing constructive *ab initio*. The State had knowledge of the existence of racial imbalances in Metro schools and knew of Metro's failure to comply with this Court's orders to implement an effective desegregation remedy. Rather than assist this Court to aid Metro in dismantling its dual system, state officials passed antibusing resolutions, maintained segregation statutes and constitutional provisions on the books, and threatened to cut off funds to any school system voluntarily imposing busing to alleviate racial balances. In *Nyquist,* state officials were held not liable for failing to withhold state funds in light of their other affirmative efforts to promote desegregation. Here, state officials have no favorable light to reflect on their actions. No "legitimate policy considerations" justify the State's conduct.

[20, 21] The Eleventh Amendment does not bar this Court from enjoining state officials from continuing to refuse to discharge their duty to participate in the implementation of desegregation in Metro schools. To assure compliance with the injunction, the Court exercises its remedial authority to order State officials to assist Metro in meeting the costs of eliminating the invidious effects of past discrimination.

C. *The Statute of Limitations Does Not Bar Metro from Seeking an Injunction and Appropriate Orders Against the State of Tennessee and Its Officials.*

[22] The Court holds that the statute of limitations does not bar the claims of Metropolitan Nashville and Davidson County for injunctive relief against the State of Tennessee because (1) the third party plaintiffs sue in their official governmental capacity seeking relief as an arm of the State for the general good of the population, and (2) the State is liable for a continuing violation of federal law thereby staying the operation of the statute of limitations period.

1. *The Claim Pursued by Metropolitan Nashville and Davidson County Involves Conduct in the Discharge of a Public Function Thereby Immunizing Third Party Plaintiffs from the Operation of the Relevant Statute of Limitations.*

[23] "Nullum tempus occurritt regi," that is, the lapse of time does not operate to bar the right of the state to pursue its civil remedies. *Williams v. Cravens,* 31 Tenn.App. 246, 214 S.W.2d 57, 59 (Tenn.App.) *cert. denied* (Tenn. 1948). In Tennessee, actions for compensatory and/or punitive damages brought under the federal civil rights statutes must be commenced within one year after the cause of action has accrued. T.C.A. §28-3-104 (1980); *Wilson v. Garcia,* ____ U.S. ____, ____ ____, 105 S.Ct. 1938, 1948-49, 85 L.Ed.2d 254, 268-69 (1985) (holding that the applicable statute of limitations for claims arising under the federal Civil Rights Act is to be determined by reference to the state statute of limitations for personal injury actions). The provisions of Title 28 of the Tennessee Code (governing limitation of actions), however, do not apply to bar actions brought by the State unless otherwise expressly provided by law. T.C.A. §28-1-113 (1980).

[24] Political subdivisions of the State are not automatically entitled to state immunity from the operation of the statute of limitations. Only when a legal corporation, such as a municipality or school board, acts as an agency and arm of the State in executing a public function is that agency entitled to the immunity provided under T.C.A. §28-1-113; *Central Hospital*

for Insane v. Adams, 134 Tenn. 429, 183 S.W. 1032, 1033 (1916). In *Adams,* the Supreme Court of Tennessee held that the Central Hospital for the Insane was not barred by the six year statute of limitations in seeking to recover compensation for care given a patient at the hospital. In ruling that the limitations period did not operate to bar the claim, the Court held that the care and custody of insane persons constituted the discharge of a government-assumed duty, thereby cloaking the institution with the sovereign immunity enjoyed by the State. *Id.,* 183 S.W. at 1034. Similarly, in *Jennings v. Davidson County,* 208 Tenn. 134, 344 S.W.2d 359, 362 (1961), Davidson County was permitted to pursue a claim against the estate of a former patient who, though during treatment was a pauper, had later inherited the modest estate of a relative. The Tennessee Supreme Court held that the provision of medical care to the poor is a public function carried on by local governments and constituted the discharge of a state-assumed duty to the population of all Tennessee.

The principle that political subdivisions of the state are, under certain circumstances, entitled to the state's sovereign immunity when pursuing civil claims was reaffirmed recently in *County of Johnson, Tennessee v. United States Gypsum Company,* 580 F.Supp. 284 (E.D.Tenn. 1984). In that case, the district court held that the statute of limitations operated to bar the claims of a county school board suing for damages resulting frm the installation of asbestos-containing acoustical and ceiling plaster throughout county schools. The Court reasoned that the maintenance of the physical plant of county structures constituted a purely local function of interest only to the local population. *Id.* at 288-89.[3] Distinguishing a series of other Ten-

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[3] This Court views the *Johnson County* case as setting forth the relevant considerations for determining whether a political subdivision is entitled to immunity from the statute of limitation. However, the Court takes exception to the overbroad statement by the *Johnson County* Court that "the authorities across the country virtually unanimously hold, the operation of a school system is a particularly local affair." 580 F.Supp. at 290.

nessee state cases in which local political subdivisions were entitled to immunity from the statute of limitations, the Court held that the county in this particular situation was suing on claims involving contract or property rights, rather than in a governmental capacity for the benefit of the general public. *Id. See also Hamblen County v. Cain,* 115 Tenn. 279, 89 S.W. 103 (1905); *Shelby County v. Bickford,* 102 Tenn. 395, 52 S.W. 772 (1899) (action by county to recover against a grantor on covenant against encumbrances).

The maintenance of the physical structure and land of county schools is a local concern and function. However, the provision of public education, involving matters of curriculum, funding, teacher qualifications and compensation, and other academic considerations are state concerns, albeit often shared by local officials. *Leeper v. State,* 103 Tenn. 500, 53 S.W. 962 (1899). *See* discussion, *supra* at pp. 1146-1148.

[25] This Court finds that Metro's claims constitute claims made as an arm of the state government regarding the discharge of a state assumed public duty. Just as a political subdivision is immune from the running of the statute of limitation for claims involving medical care provided to the indigent or to the insane, third party plaintiffs are entitled to immunity with respect to claims arising from the provision of education to the young.

2. *The State of Tennessee is Liable for a Continuing Violation of Federal Law Thereby Staying the Operation of the Statute of Limitations.*

[26] The vestiges of state-imposed segregation continue to be present in Davidson County. State officials are under a continuing obligation to act affirmatively to eliminate these debilitating effects. Yet, the State continues to refrain, maintaining that the issue of desegregation is one exclusively between this district court and local officials. This Court views the State's conduct as malfeasance, indicative of a continuing violation of federal law, thereby staying the running of the relevant statute of limitations.

[27, 28] The statute of limitations begins to run from the date of the injury, or if the injury is not apparent, from the time the harm reasonably should have been discovered. However, when the injury-causing activity continues over time, unabated, that conduct is not legitimized by the passage of time. Unlike the doctrine of adverse possession in real property law, acquiescence to a continuing violation of constitutional rights does not extinguish the individual's rights. The failure of the attorneys for the various parties in this case to pursue their civil remedies against the State of Tennessee during the asserted statute of limitations period does not constitute a waiver of those rights and will not insulate the State from legal liability.

D. *Principles of Equity Do Not Bar Third Party Plaintiffs from Pursuing their Legal Remedies.*

1. *Laches.*

This case was filed in 1955 and a comprehensive desegregation order entered in 1971. Nevertheless, the State of Tennessee was not joined as a defendant until 1981. The State argues therefore that the doctrine of laches should bar the award of any relief against it. The Court disagrees.

[29, 30] Mere delay is insufficient to justify the operation of laches. The doctrine requires both delay and injury. *Williams v. Cravens,* 31 Tenn.App. 246, 214 S.W.2d 57, 60 (Ct.App.), *cert. denied* (Tenn. 1948). The State has failed to allege any consequence that the Court reasonably can consider to have injured or prejudiced the interest of the State as a result of other parties' failure to have joined the State at an earlier date. In seeking to invoke the doctrine of laches, the State calls upon the Court to exercise its powers in equity. Accordingly, the Court will consider the dictates of fairness and justice and will evaluate all factors in determining whether relief should be barred against the State.

The State created and maintained a system of segregation between the races since statehood. That system remained in place,

officially, through 1954. Even assuming delinquency on the part of other parties in this case in failing to join the State until 1981, fairness dictates that the actor primarily responsible for the discriminatory system should bear some responsibility for remedying the system's invidious consequences.

Finally, the racial minorities in Tennessee are, for the most part, concentrated in urban centers. Recognizing the affirmative legal obligation to eliminate the vestiges of state-imposed segregation, it is unfair to call only upon urban dwellers to bear the expenses of desegregation. The remedy should be carried out at the expense of all Tennesseans, both those residing in the cities and those who live in rural areas.

2. *Unclean Hands.*

The State asserts that in view of Metro Nashville and Davidson County's recalcitrance in failing to comply with the Court's order to desegregate local schools, the State should not be forced to share in the cost of desegregating Nashville schools. The Court notes that the State likewise has been less than enthusiastic about the prospects of desegregation. The failure to remove the State's unlawful constitutional and statutory provisions mandating segregation and its passage of statutory provisions authorizing the cutoff of funds to local school districts voluntarily desegregating schools through busing reflects conduct taken in less than good faith, vis-a-vis the state's affirmative obligation to eradicate the effects of past discrimination.

[31] If an equitable doctrine is to apply at all, the Court would look to the principles of *in pari delicto*. That is, recognizing that both Metro and the State have been culpable of acts taken in bad faith, as between the two, the State is just as, if not more, subject to condemnation for its conduct. The Court, however, refrains from assessing the relative reprehensibility of the conduct of the defendants in this action. Rather, it holds that whatever bad deeds Metro may be responsible for, that conduct will not operate to bar the State from sharing in its

responsibility to desegregate Metropolitan Nashville and Davidson County schools.

E. *Relief.*

The Court hereby enjoins the State officials and the State of Tennessee from refusing to carry out their affirmative obligation to participate in eliminating the vestiges of past discrimination and to participate in the desegregation of Metro Nashville schools. Pursuant to the injunction, the Court directs the State to pay sixty percent (60%) of the costs directly attributable to the desegregation program. Directing payment of state funds is a necessary consequence of compliance in the future with a substantive federal-question determination." *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Milliken v. Bradley,* 433 U.S. 267, 289, 97 S.Ct. 2749, 2761, 53 L.Ed.2d 745 (1977).

The relief ordered today complies with the standards set forth by the Eighth Circuit Court of Appeals in *Liddell v. State of Missouri,* 731 F.2d 1294, 1305-09 (8th Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984), for evaluating the boundaries of the remedial power of federal district courts in devising relief ordered against State officials in school desegregation cases. The *Liddell* court set forth three considerations: (1) the remedy must be closely tailored to the nature and scope of the violation; (2) the remedy must seek to restore the victims of discrimination as nearly as possible to the position they would have occupied absent the discrimination; and (3) the order must not unduly infringe on state or local government autonomy.

This Court concludes that the order in this case directing the State to assume part of the costs of desegregating Metro Nashville schools is responsive to the constitutional violations and injuries that have occurred. The infusion of state funds into the Metro desegregation effort will permit Metro to offer those remedial programs which currently are part of the com-

prehensive remedial plan but presently are not offered because of insufficient funding. The effects of past discrimination continue to be manifested in many school age black children in terms of levels of performance on standardized testing, development of effective communication skills, and the ability to earn high school and higher education degrees. The present desegregation plan seeks to ameliorate these conditions. The payment of State funds to finance the remedial programs seek to improve the educational opportunities for black children so as to permit them to achieve a level of academic performance that reasonably could be expected had the black population not have been subjected to long term segregation in public education. Finally, the Court believes that the impact on the state treasury will not unduly infringe on the state's ability to carry on traditional state functions. The remedy is not intrusive on the autonomy of state officials to exercise discretion over state affairs.

For these reasons, the Court grants the motion of Metropolitan Nashville and Davidson County for summary judgment.

APPENDIX E

Robert W. Kelley, et al.,
Plaintiffs-Appellants,

v.

Metropolitan County Board Of Education Of Nashville
And Davidson County, Tennessee,
Defendants-Appellees.

No. 81-5370.

United States Court of Appeals, Sixth Circuit.

Argued Dec. 11, 1981.

Decided July 27, 1982.

Certiorari Denied Jan. 24, 1983.

See 103 S.CT. 834

Plaintiffs appealed from an order of the United States District Court for the Middle District of Tennessee, 511 F.Supp. 1363, Thomas A. Wiseman, Jr., J., approving board of education's desegregation plan in a school desegregation action. The Court of Appeals, George Clifton Edwards, Jr., Chief Judge, held that: (1) the District Court improperly directed school board to bring about a 15% minimum presence of either race in each middle and high school where the school system had a 68% white and 32% black racial composition, in that the 68% white and 32% black ratio should have been employed as the "starting point" in the remedy-fashioning process; (2) the District Court committed fundamental error in directing school board "to establish a system of K-4 or K-5 elementary schools of a neighborhood character, all the while maximizing opportunities for integration in a neighborhood setting" where such remedy would leave elementary schools highly segregated; and (3) the school board's decision affirmed by the District Judge to convert a high school into a middle school and to build a new com-

prehensive high school was not based on clearly erroneous findings or founded in a racally discriminatory purpose.

Affirmed in part, reversed in part, and remanded.

Celebrezze, Circuit Judge, concurred in part, dissented in part, and filed opinion.

Avon N. Williams, Jr., Richard H. Dinkins, Nashville, Tenn., Jack Greenberg, James M. Nabrit, III, Bill Lann Lee, New York City, for plaintiffs-appellants.

William R. Willis, Jr., Marion F. Harrison, Nashville, Tenn. for defendants-appellees.

Before Edwards, Chief Judge, Jones, Circuit Judge and Celebrezze, Senior Circuit Judge.

George Clifton Edwards, Jr., Chief Judge.

This much delayed school desegregation case is before this court for review of a desegregation plan approved by the District Court.[1] It offers no new legal issues and can and must be decided by this court on the basis of final decisions of the United States Supreme Court. *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d. 745 (1977) (Milliken II) requires our affirmance of the District Court on several issues. The cases that require our reversal of two issues decided by the lower court are legion. Leading the list are *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Green v. County Schol Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973); *Penick v. Columbus Board of Education*, 583 F.2d

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[1] Kelley v. Metropolitan County Board of Education, 511 F.Supp. 1363 (M.D. Tenn. 1981).

787 (6th Cir. 1978), *aff'd*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979); *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935, 100 S.Ct. 1329, 63 L.Ed.2d 770 (1980); and last but not least, *Kelley v. Metropolitan Board of Education*, 463 F.2d 732 (6th Cir.), *cert. denied*, 409 U.S. 1001, 93 S.Ct. 322, 34 L.Ed.2d 262 (1972).

It should be noted at the outset that this case is markedly distinguished in legal terms from those that have come before this and other courts from states where segregation by law has never existed or was long ago statutorily abandoned. In those cases, the federal courts have been primarily concerned with the question of whether or not predominantly black and predominantly white schools existed as a result of intentional segregation practices on the part of the school boards concerned. *See Reed v. Rhodes, supra; Penick v. Columbus Board of Education, supra; Brinkman v. Gilligan,* 583 F.2d 243 (6th Cir. 1978), *aff'd sub nom., Dayton Board of Education v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) (Dayton II). No such inquiry is necessary in this case; Tennessee's history of *de jure* segregation is well-established.

In 1955, when litigation aimed at desegregating the Nashville schools began, racial segregation was constitutionally and statutorily mandated in Tennessee, and the School Board was in full compliance with those provisions. Article 11 § 12 of the state constitution proclaimed: "No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school," and statutes consistent with this provision were enacted. *See* T.C.A. §§49-3701 *et seq*. In 1956, the Tennessee Supreme Court struck down the statutes requiring compulsory separation of races, *Roy v. Brittain*, 201 Tenn. 140, 297 S.W.2d 72 (1956), and in 1959 this court invalidated a new law allowing local school boards to provide white, black and mixed schools, with attendance to be determined by parental choice. *Kelley v. Board of Education*, 270 F.2d 209 (6th Cir.), *cert. denied*, 361 U.S. 924,

80 S.Ct. 293, 4 L.Ed.2d 240 (1959). The statutes thereafter were omitted from the revised statutory compilation, with the compiler's note stating the statutes had been omitted because they were unconstitutional, citing to the above-named cases. In 1970, the Tennessee Legislature did pass a law mandating the public schools would be open to persons of all races, *see* Tenn. Code Ann. §49-1770 (1977). But it was not until 1978 that Tennessee's constitution was amended to delete the requirement of separate schools. Finally, effective March 15, 1979, more than twenty years after the laws were declared unconstitutional, the Tennessee Legislature repealed the old school segregation statutes.

It therefore is clear that when the first "comprehensive and potentially effective desegregation order"[2] was entered in this case in 1971, the existing racial separation in the Nashville schools had resulted from *de jure* segregation. And despite the 1971 plan's potential, the record establishes and the District Court found that desegregation in the Nashville schools has never been achieved. Thus the effects of state-imposed segregation have yet to be eradicated.

It was the School Board's implementation of the 1971 plan that prevented effective desegregation, according to the District Court. In *Kelley v. Metropolitan Board of Education*, 463 F.2d 732 (6th Cir.), *cert. denied*, 409 U.S. 1001, 93 S.Ct. 322, 34 L.Ed.2d 262 (1972), this court approved the 1971 HEW-drafted desegregation remedy, which was based on *Swann v. Charlotte-Mecklenburg, supra*, and which attempted to achieve desegregation through zoning. After the plan had been in effect for one year, the Board petitioned for changes, claiming hardships had arisen from the plan. The District Court emphatically rejected the petition, finding the Board had not acted in good faith in implementing the desegregation remedy. Thereafter, the Board submitted proposals for construction and for a kindergarten

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[2] 463 F.2d at 734.

program using portables, which both were opposed by plaintiffs as inconsistent with the approved plan. Plaintiffs later petitioned that the Board be held in contempt for its unsanctioned implementation of the proposals. In 1978 the Board petitioned to amend school attendance zones; plaintiffs then amended their contempt petition.

In 1979, the District Court began hearings on all pending matters concerning the school system.[3] From the proof presented, the District Court found the Nashville-Davidson County school system had become increasingly segregated in the years since 1971. The original remedy had not extended throughout the county, and whites had been able to avoid the plan by fleeing to the outer reaches, leaving the inner city schools with a high black population. After reviewing the evidence, the District Court stated, "[t]he resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the implementaion of the Court's order, amounts to a *de jure* segregation." *Kelley v. Metropolitan County Board of Education*, 479 F.Supp. 120, 123 (M.D.Tenn. 1979). The "resegregation" was exacerbated by the Board's institution of an optional transfer policy that violated the spirit of the 1971 order and emasculated desegregation efforts, according to the District Court.

Judge Wiseman's determination that desegregation has never been achieved in the Nashville-Davidson County school system is amply supported by the record, and that finding, therefore, is affirmed. Thus the School Board remains under its duty "to eliminate from the public schools all vestiges of state-imposed segregation." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 (1971).

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[3]Several of the issues pending before the District Court when hearings were resumed in 1979 still have not been heard. These pending matters include allegations of discriminatory faculty and staff assignments, charges that the defendants are in contempt of court, and motions for attorneys' fees.

EDUCATIONAL COMPONENTS

As a result of the 1979 hearings, the District Court ordered the Board to formulate a new desegregation plan "assuming no parameters heretofore ordered by the Court, but with the primary objective of the achievement of a unitary school system for the entirety of Davidson County." 479 F.Supp. at 122. After several proposals and in accordance with specific instructions from the District Court, *see Kelley v. Metropolitan County Board of Education*, 492 F.Supp. 167 (M.D.Tenn. 1980), the Board drafted a plan that gained the District Court's approval. *Kelley v. Metropolitan County Board of Education*, 511 F.Supp. 1363 (M.D.Tenn. 1981). It is plaintiffs' appeal from this order that is before me.

We affirm certain aspects of this plan. With regard to the District Judge's orders concerning education components, we approve the remediation program planned by the Board of Education's staff for "those schools or classes where the achievement levels are below the average for the system and/or where majority of a school's population is made up largely of socio-economically deprived children who suffer the continuing effects of prior discrimination." 511 F.Supp. at 1368-69. Our affirmance of this issue does not depend upon the outcome of any other issue in this case, nor does it depend upon whether or not Title I federal funds are available. *See Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977).

Likewise, this court affirms the District Judge's order for the use of West End Junior High School as a magnet school, with selection criteria designed to provide equal access to all races. Further, we affirm the District Court's approval of the already launched Afro-American studies program. While we note plaintiff's objections to lack of specificity of such programs, we believe this is a matter that can be handled by the District Court and the School Board without intervention by the appellate court. Finally, we affirm the District Judge's approval of the "Together We Can . . . Together We Will" program.

PUPIL ASSIGNMENT COMPONENT-MIDDLE SCHOOLS AND HIGH SCHOOLS

[1] In large measure, the pupil assignment components of this plan do not withstand constitutional srutiny. In fashioning its school desegregation plan, the Board was directed by the District Court to bring about a 15% minimum presence of either race in each middle school (grades 5-8), and application of this standard to the high schools as well was accepted by the lower court. The District Court's choice of 15% either race minimum presence as a desegregation standard would find acceptable schools that are either 85% white or 85% black. This figure is clearly not appropriate as a "starting point" in a school system that has a 68% white-32% black racial composition.[4]

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25, 91 S.Ct. 1267, 1279-1280, 28 L.Ed.2d 554 (1971), Chief Justice Burger wrote for a unanimous Supreme Court as follows:

> In this case it is urged that the District Court has imposed a racial balance requirement of 71%-29% on individual schools. The fact that no such objective was actually achieved—tends to blunt that claim, yet in the opinion and order of the District Court of December 1, 1969, we find that court directing
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> > "that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . [t]hat no school [should] be operated with an all-black or predominantly black student body, [and] [t]hat pupils of all grades [should] be assigned in such a way that as nearly as practicable

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[4]At the middle school level, seven of the 24 schools are projected as majority black, and fully one-half would fall outside of a 15% plus or minus deviation from the 32% minority presence in the school system.

> the various schools at various grade levels have about the same proportion of black and white students."

The District Judge went on to acknowledge that variation "from that norm may be unavoidable." This contains intimations that the "norm" is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

As the voluminous record in this case shows, the predicate for the District Court's use of the 71%-29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans.[8] As the statement of facts shows, these findings are abundantly sup-

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[8]The final board plan left 10 schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort. As discussed below, the Charlotte board was under an obligation to exercise every reasonable effort to remedy the violation, once it was identified, and the suggested techniques are permissible remedial devices. Additionally, as noted by the District Court and Court of Appeals, the board plan did not assign white students to any school unless the student population of that school was at least 60% white. This was an arbitrary limitation negating reasonable remedial steps.

> ported by the record. It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr. Finger was designated to assist the District Court to do what the board should have done.
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> We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

(footnotes 7 and 9 omitted).

As mentioned earlier, this record shows the black-white pupil ratio in the Nashville-Davidson County school system to be 68% white and 32% black. It is that ratio the District Court should have employed as the "starting point" in the remedy-fashioning process.

The District Judge selected the admittedly arbitrary 15% either race figure because "it seem[ed] to represent a reasonable attempt to provide intercultural and interracial contact as a foundation for social harmony." 492 F.Supp. at 193. This selection, and such other errors as we find in the District Court's opinions and orders, originate with his apparent conclusion that the unanimous opinion of the Supreme Court in *Swann* has somehow been overruled or eroded. But the disposition of cases originating in this and other circuits does not support any such

conclusion. In fact, *Swann* was strongly reaffirmed by the Supreme Court's approval of this court's opinion in *Penick v. Columbus Board of Education*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979). The *Swann* opinion is the law of the land. And this court, the District Court for the Middle District of Tennessee, and the School Board of Nashville and Davidson County are required by our constitutional form of government to follow its standards. In accordance with those standards, the District Judge will be required on remand of this case to determine the currently prevailing racial population of the school system concerned and to employ that ratio as a "useful starting point in shaping a remedy to correct past constitutional violations."

We approve all other aspects of the middle school and high school plans, recognizing of course, that rejection of the 15% either race minimum presence as a desegregation standard will necessarily involve significant redrafting and restructuring. Whenever the *Swann* discussion set out above requires revision of these school plans, such revisions must be made. We note our awareness that this instruction encompasses *Swann's* recognition that there is no constitutional right to any "particular degree of racial balance." But we also recognize that predominantly one-race schools deserve "close scrutiny" and that the duty on the Board and courts to dismantle a dual system is clear:

> The district judge or school authorities should make every effort to achieve the *greatest possible degree of actual desegregation* and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but *in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their*

> *racial composition.* Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann, supra 402 U.S. at 26, 91 S.Ct. at 1281 (emphasis added).

In line with this duty, we suggest the formula employed by this court in the *Columbus* case, i.e., use of a 15% plus or minus deviation from the 68-32% white-black ratio for all students in the school system.[5]

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[5] An essential element of the plan on remand thus will include "reassigning students to achieve the greatest possible number of desegregated schools." See *Liddell v. Board of Education of City of St. Louis*, 667 F.2d 643 (8th Cir. 1981). We reemphasize that we are not requiring any *precise* degree of racial mixing, but we are requiring the District Court to use all feasible methods of pupil assignment of integration possible.

A directive to employ a racial balancing approach clearly is anything but novel. For example, this court in *Northcross v. Board of Education of Memphis City Schools*, 466 F.2d 890 (6th Cir. 1972), *cert. denied*, 410 U.S. 926, 93 S.Ct. 1355, 35 L.Ed.2d 586 (1973), approved the District Judge's view that *Swann* required more "intensified desegregation efforts" for Memphis than a neutral geographic zone assignment plan and his concomitant order of busing to achieve racial balance. We stated:

> It is thus clear that far from havng achieved a unitary school system, the Board has helped to perpetuate the old dual system. Under these circumstances *there can be no doubt that the District Court was under an obligation to order the adoption of a plan providing for further desegregation.* Since many of the one-race schools are clearly the result of discriminatory actions of the School Board *there can be no doubt that under any interpretation of Swann the elimination of such schools must be one of the objectives of any appropriate desegregation plan.*

PUPIL ASSIGNMENT COMPONENT—GRADES K-4

[2] The District Court directed the Board "to establish a system of K-4 or K-5 [kindergarten through fourth or fifth grade] elementary schools of a neighborhood character, all the while maximizing opportunities for integration in a neighborhood setting."[6] The Board complied, and this plan was approved by the District Court. This was fundamental error, unconstitutional under *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979), and *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979). All of these cases have held or implied that the constitutional barrier to racially segregated schools applies to *all* schools in the system, including the early grades.

In this case, the District Judge's order would serve to resegregate or to maintain segregation in grades K-4. Forty-

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Id. at 893-94 (emphasis added).

It is beyond dispute that Nashville has never achieved unitary status, in large part because of the Board's implementation of the 1971 plan. We do not believe the District Court and Board fulfilled their duties to eliminate one-race schools by accepting as desegregated 85% black and 85% white schools.

We recognize our directive to the District Court in this case is quite specific. Our specificity, however, is made necessary by our view that "a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is . . . intolerable." *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968).

[6] 511 F.Supp. at 1371.

seven of the 75 elementary schools would be more than 90% one race, with 14 schools projected as more than three-fourths black.

The District Judge based his directive on the perceived benefits of a neighborhood school system for elementary students, noting the desirability of parent-teacher contact, reduced pupil-teacher ratios, and other "educational" advantages.[7] In *Swann,* Chief Justice Burger considered pro-neighborhood arguments, presumably similar to those influencing the District Judge in this case, and found them wanting:

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconve-

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[7] The importance of desegregated schools, however, particularly for minority students, was recently emphasized by the Supreme Court:

> Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493 [74 S.Ct. 686, 691, 98 L.Ed. 873] (1954). When the environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," *Estes v. Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437, 451 [100 S.Ct. 716, 723, 62 L.Ed.2d 626] (1980) (Powell, J., dissenting).

Washington v. Seatle School District, —U.S. —, —, 102 S.Ct. 3187, 3196, 73 L.Ed.2d 896 (1982).

> nient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.
>
> No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears neutral.

402 U.S. at 28, 91 S.Ct. at 1280.

It is thus clear from *Swann* that no matter whether neighborhood schools may be desirable on some grounds, their advantages cannot outweigh the constitutional requirement to desegregate the schools.[8]

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[8] In the Supreme Court's latest consideration of the neighborhood school concept, the majority struck down a statewide initiative adopted by the voters of the state of Washington that would require limiting school attendance to those students residing in the neighborhood of the school concerned. While the majority decision was joined by five Justices, the four dissenters emphasized that they disagreed because there was no "affirmative duty to integrate the schools in the absence of a finding of unconstitutional segregation." *Washington v. Seattle School District*, — U.S. —, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). In so doing, the four dissenters cited with approval the case upon which this opinion strongly relies, *Swann, supra.*

The unanimous *Swann* opinion also dealt squarely with the issue of busing, another concern of the District Judge in this case:

> (4) *Transportation of Students.*
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> The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969-1970 in all parts of the country.
>
> The importance of bus transportation as a normal and accepted tool of education policy is readily discernible in this and the companion case, *Davis, supra.*[11] The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

Thus we read *Washington v. Seattle School District* as unanimous on the crucial issue in our present Nashville case.

[11] During 1967-1968, for example, the Mobile board used 207 buses to transport 22,094 students daily for an average round trip of 31 miles. During 1966-1967, 7,116 students in the metropolitan area were bused daily. In Charlotte-Mecklenburg, the system as a whole, without regard to desegregation plans, planned to bus approximately 23,000 students this year, for an average daily round trip of 15 miles. More elementary school children than high school children were to be bused, and four- and five-year olds travel the longest routes in the system.

Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.

The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about seven miles and the District Court found that they would take "not over 35 minutes at the most."[12] This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.

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[12] The District Court found that the school system would have to employ 138 more buses than it had previously operated. But 105 of those buses were already available and the others could easily be obtained. Additionally, it should be noted that North

Swann, supra at 29-31, 91 S.Ct. at 1282-1283.

The Court's approval of transportation for elementary students illustrates the fact that these groups of children are not automatically or easily exempted from a busing program. Only when "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process" should elementary children be omitted from a busing plan. No such showing was made or required by the District Court in this case.[9]

Carolina requires provision of transportation for all students who are assigned to schools more than one and one-half miles from their homes. N.C.Gen.Stat. §115-186(b) (1966).

[9] The Circuit Courts generally have disapproved desegregation plans that do not include all grades in the school system, often noting that *Brown v. Board of Education* itself involved segregated elementary schools. "It is axiomatic that black students, particularly in the elementary grades, suffer irreparable harm from the maintenance of a segregated school system." *United States v. School District of Ferndale,* 577 F.2d 1339 (6th Cir. 1978). In *Haycraft v. Board of Education,* 585 F.2d 803, 805 (6th Cir. 1979), *cert. denied,* 443 U.S. 915, 99 S.Ct. 3107, 61 L.Ed.2d 879 (1979), this court rejected a plan that exempted first-graders from busing, saying, "To exempt first grade students from busing would leave vestiges of segregation intact contrary to this Court's mandate." The District Court found that first graders would be subject to "a high risk of failure" if forced to participate in a busing program, but this court found such arguments an insufficient basis for exclusion. In *Lee v. Macon County Board of Education,* 616 F.2d 805 (5th Cir. 1980), the Fifth Circuit disapproved a neighborhood school plan in a case much like *Kelley.* In *Lee,* grades K-5 would attend neighborhood schools with the result that two-thirds of elementary black students would attend schools more than 95% black. The District Judge had based his remedy on findings that attending a school near home was important for young children and that pairing would interfere with individualized instruction. The appellate court held these reasons "legally insufficient."

> If the decision were ours initially, we might pay greater heed to the education disadvantages of the rapid dismantling of a dual school system. We may not, however, weigh advantages against disadvantages, for that judicial balancing has already been accomplished. The law orders eradication of all vestiges of the dual system, if some feasible plan can be devised.

616 F.2d at 811 (citing *Swann* 402 U.S. at 15, 91 S.Ct. at 1275).

In sum, while neighborhood schools may be desirable in a school system free of a history of segregation, where such a

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The court said despite the school board's "apparent good faith attempt to desegregate in 1970," the system had never become a unitary one. Therefore, the duty to dismantle the dual school system continued, and residential patterns could not serve to justify racial imbalance. In rejecting the District Court's plan, the *Lee* court noted that the temporary or permanent presence of one or more racially identifiable elementary schools, or even an omission of some of the earlier grades from a busing program, *might* be permissible. It stressed the need, however, for detailed fact-findings indicating the circumstances motivating "any variations from complete desegregation of Tuscaloosa's schools." *Id.* at 812.

Numerous other courts have reached similar conclusions. In *Keyes v. School District No. 1,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066, 96 S.Ct. 806, 46 L.Ed.2d 657 (1976), the Tenth Circuit rejected a "part-time" desegregation program for elementary students. The District Court had permitted children to spend part of the school day at their neighborhood schools, citing a need for recreational, extra-curricular and parental activities. In disapproving this plan, the appeals court stated, "although we acknowledge such neighborhood contact to be important, we cannot place it above the constitutional rights of children to attend desegregated schools. We perceive those rights to include full-time attendance in a desegregated setting." *Keyes* at 478. *See also Adams v. United States,* 620 F.2d 1277 (8th Cir.), *cert. denied,* 449 U.S. 826, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980); *Anderson v. Dougherty City Bd. of Educ.,* 609 F.2d 225 (5th Cir. 1980); *Mills v. Polk County Bd. of Educ.,* 575 F.2d 1146 (5th Cir. 1978); *United States v. Texas Ed. Agency,* 532 F.2d 380 (5th Cir.), *vacated and remanded on other grounds,* 429 U.S. 990, 97 S.Ct. 517, 50 L.Ed.2d 603 (1976), *concepts reaffirmed,* 564 F.2d 162 (5th Cir. 1977); *Clark v. Bd. of Educ.,* 465 F.2d 1044 (8th Cir. 1972), *cert. denied,* 413 U.S. 923, 93 S.Ct. 3054, 37 L.Ed.2d 1044 (1973); and *Flax v. Potts,* 464 F.2d 865 (5th Cir. 1972), *cert. denied,* 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299 (1972).

Also instructive is the Supreme Court's treatment of *Estes v. Metropolitan Branches of the Dallas NAACP,* 444 U.S. 437, 100 S.Ct. 716, 62 L.Ed.2d 626 (1980) (opinion below at 572 F.2d 1010). The Fifth Circuit had rejected the District Court's plan for desegregating Dallas on the basis that it left existing a large number of one-race schools (defined as more than 75% one-race). Under the District Court's plan, grades K-3 remained in neighborhood schools, and no busing of high school students was ordered; these limitations

history exists, a plan must do more; it must make "every effort to achieve the greatest possible degree of actual desegregation." Some inconvenience and even awkward remedies may be necessary where neutral assignment plans fail to desegregate the schools.[10]

Because the remedy leaves elementary schools highly segregated, the District Court's approval of a neighborhood school plan for grades K-4 is rejected. On remand, the District Judge is instructed to include these children within a pupil assignment program drafted in compliance with this opinion, except where inclusion would "risk the health of the children or significantly impinge on the educational process" within the meaning of *Swann*.

It appears to this court that Nashville has some great advantages for solving the desegregation problem. It is a far more compact city than, for example, Cleveland or Detroit, and in general, the schools in need of desegregation are centrally located. Of equally great importance, the school system is

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were largely based on the District Court's concerns over resegregation, community support, and the social and educational consequences of extensive busing. The Fifth Circuit remanded and ordered the court to rezone or to provide time and distance studies that would explain failure to use pairing and clustering or busing to eliminate the one-race schools. The Supreme Court granted certiorari to consider "the need to eliminate one-race schools through further busing," however, the writ was later dismissed as improvidently granted. Justices Powell, Rehnquist and Stewart dissented from the dismissal, stressing a need to affirm the District Court's "sensitive" and "promising" plan. The dismissal, however, indicates the remaining members of the court disagreed. The withdrawal of certiorari suggests, particularly in the face of the dissent, that the majority approved the Fifth Circuit's handling of the District Court's plan. In line with the Fifth Circuit, we are ordering the lower court to eliminate as far as possible the one-race or virtually one-race schools and to explain with "time and distance studies" or by reference to "natural boundaries or traffic patterns" why elimination is not feasible for any remaining schools.

[10] *See Swann, supra* 402 U.S. at 28, 91 S.Ct. at 1282.

organized on a Davidson County-wide basis. We approve the Board's and District Court's intention to apply the desegregation plan to the entire county.

As we have shown above, we are convinced the District Court's approval of the Board's plan was legal error.[11] In addition, we recognize the lower court's approval was based in part on a conviction, with which we take issue, that desegregation has not advaned the educational achievement levels of black children and that it is a serious "education cost" in the elementary grades. It was largely for these reasons, along with a fear of increased "white flight,"[12] that Judge Wiseman was persuaded to deviate from a *Swann*-type remedy. *See* 491 F.Supp. at 189-92. While doubtless the jury on the educational benefits of desegregation will be out for a long time, recent findings indicate results directly contrary to the views expressed by the District Judge. Some of this material is very current and therefore was unavailable to Judge Wiseman at the time his opinions were written.[13] We note these findings only because of the District Court's strong reliance on this matter. We also note and take this opportunity to remind the District Court that the issue of achievement scores is constitutionally irrelevant in a school system with a history of illegal segregation.

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[11] The dissent suggests that we have not employed an abuse of discretion standard in reviewing the District Court's plan. "Improper application of the law, however, is itself an abuse of discretion. An appellate court may reverse if the decision below was based on an erroneous view of the law. . . ." *United States v. School District of Ferndale,* 577 F.2d 1339 (6th Cir. 1978).

[12] Where the Board and court are under a duty to dismantle a dual system, white flight cannot be used to justify a failure to meet the obligation. In *United States v. Schotland Neck Board of Education,* 407 U.S. 484, 491, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1972), the Supreme Court states: "While this development [white flight] may be cause for deep concern to the respondents, it cannot, as the Court of Appeals recognized, be accepted as a reason for achieving anything less than complete uprooting of the dual public school system."

[13] These findings can be found in the Appendix to this opinion.

REMAINING ISSUES

We now turn to other issues advanced by plaintiff's appeal. First, it is urged that the approved plan places a disproportionate burden of busing on black middle school students. Any intentional effort to make the transportation burden fall more heavily on one race than on the other would, of course, be violative of basic constitutional law. Many factors, however, must be taken into account in working out a practical assignment system, including availability of schools, locations of schools, ease of travel between specific neighborhoods and specific schools, and the facilities for education existing in such schools. By mentioning these factors, we do not by any means attempt to exhaust the list; the foregoing are cited purely for illustration. With regard to the plaintiff's middle school busing burden issue, we are unable to find the District Judge's disposition of this issue either clearly erroneous as to facts or in violation of law. It is obvious, however, that our rejection of the 15% either race minority presence as a desegregation standard will necessitate a substantial revision of the middle school busing program. Thus, the above is suggested as guidance to the District Judge in weighing a new plan.

[3] Plaintiffs also urge the retention of Pearl High School as a senior high, objecting to its use as a middle school under the Board's plan. We, like the District Judge, sympathize with plaintiffs' argument for retention of Pearl as a high school because of its "historic contribution to the black community of Nashville," 492 F.Supp. at 184. We do not find, however, that the School Board's decision, as affirmed by the District Judge, to convert Pearl into a middle school and to build a new Pearl-Cohn comprehensive high school to be based on clearly erroneous findings or founded in a racially discriminatory purpose. Under these circumstances, we are not empowered to overturn the apparently nondiscriminatory educational decision here involved.

As to plaintiffs' last issues, however, we feel quite differently. Plaintiffs' argument that faculty and staff assignments have been made on a racially discriminatory basis should long ago have been the subject of hearing and decision. Faculty desegregation is a considerably easier task than is overall desegregation of schools. Similarly, we believe that there long ago should have been a hearing on plaintiffs' motion for attorneys' fees and expenses. Finally, we observe that plaintiffs' charges of contempt against the defendants should not be left in limbo.

From this distance, we can make no judgment on these matters since no factual record has been written. The District Court, however, should give prompt attention to all three of these issues. The delays in this case suggest that absolute priority be accorded to this litigation until a unitary system has been achieved.

The dissent in this case is in utter disregard of the Supreme Court's interpretation of the Constitution of the United States in such cases as *Brown, supra; Green, supra; Swann, supra; Keyes, supra; Penick v. Columbus Bd. of Educ., supra;* and *Dayton II, supra.* It goes without saying that this court is required to follow constitutional law as defined by the Supreme Court of the United States. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958).

The judgment of the District Court is affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this decision.

APPENDIX

After this case was argued in this court, a study made under the auspices of Vanderbilt University and now published in the nine volume ASSESSMENT OF CURRENT KNOWLEDGE ABOUT THE EFFECTIVENESS OF SCHOOL DESEGREGATION STRATEGIES (Vander-

bilt Univ. 1981) [hereinafter cited as DESEGREGATION STRATEGIES] was released. The Vanderbilt project was financed with federal funds and incorporates the work of nationally prominent experts in the school desegregation field. It concludes that desegregation raises the level of black achievement, with specific findings on the Nashville schools, and emphasizes the importance of including primary grades in a desegregation plan. Significant findings include the following:

1. "It seems reasonably clear that minority children who attend school with white children perform better on standardized achievement tests than do children who attend segregated schools." 2 DESEGREGATION STRATEGIES at 33. *See also* Crain & Mahard, *Desegregation and Black Achievement: A Review of the Research,* 42 LAW & CONTEMP. PROB. 17 (Summer 1978). For example, a study of Nashville elementary schools revealed that black children's test scores rose an average of .28 when placed in desegregated schools. This amounts to a little over 3/10ths of a grade level and was termed a "sizeable" achievement gain. 5 DESEGREGATION STRATEGIES at 184. It also is estimated that desegregation tends to raise black achievement by approximately four IQ points.

2. To boost achievement, desegregation must occur in the early grades.

> The findings that strong effects of desegregation occur in the earliest grades are a strong argument against delaying desegregation past grade one. Only a few school systems leave the early primary grades segregated; the most significant is Dallas. Our analysis indicates that this is a very unfortunate policy. Many school systems leave kindergarten students segregated. This analysis suggests it would be academically very beneficial to include minority kindergarten students in a desegregation plan.

Id. at 185.

The study concludes that desegregation "creates a sudden burst of achievement growth" during the early grades and that after that time, desegregated students maintain but do not increase this higher level of achievement. The study also notes, "[N]o desegregation plan where elementary grades are excluded can effectively reduce racial isolation. Moreover, the research suggests that desegregation at early grades holds the greatest promise for improving race relations, increasing minority achievement and ultimately reducing racial prejudice." *Id.* at 70.

3. Racial proportions in the school are related to achievement. The study suggests that minority students score higher when they are in predominantly anglo classrooms; however, it is important that more than a small number of minority students attend majority schools. Where minority students comprise less than 15% of the school's population, little mixing of races uccurs, and where blacks make up less than 20% of a high school's population, black male achievement suffers. *Id.* at 115, 173, 186 and 196.

4. Where a school district is organized on a county-wide basis, as is the Nashville-Davidson Cunty school system, "white flight" has much less long-term impact on the schools. *Id.* at 47.

A 1981 study by the National Assessment of Educational Progress, a federally sponsored group that annually tests 9-, 13- and 17-year-olds, reports that black achievement scores have increased significantly over the past 10 years. In an assessment of reading performances, the study found that while black students still scored below white students, they had narrowed the gap considerably. For example, 9-year-old black students were 14.2 percentage points below the national norm in 1971 in literal comprehension, but in 1980 black students were only 7.1 percentage points below the national average. This result was

achieved in the face of an overall achievement gain for *all* tested students. Black students scored achievement gains at all three age groups, although increases were more significant for the 9-and 13-year-olds than for the 17-year-olds.

This black achievement gain extends from reading into other disciplines, according to Burton & Jones, *Recent Trends in Achievement Levels of Black/White Youth,* EDUCATIONAL RESEARCHER (April 1982). That article analyzes tests administered over five subject areas from 1969 to 1980 by the National Assessment of Educational Progress and concludes:

> For learning areas other than writing, the average difference between white and black 9-year-olds has shrunk from about 17 percentage points to 10 or 11 over the 1970s. At age 13 (Figure 5) mathematics is relatively the most difficult area for black students. For the areas other than mathematics, means for 13-year-old black students were 17 to 18 percentage points below those for white students in 1970, but only 12 to 13 points below by 1980. A decrease in the difference between white and black students over time is evident at both ages.
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> Typically, when achievement for white students has declined, that for black students has declined less; when whites have improved, blacks have improved more. The difference between the races has decreased at both ages in mathematics, science, reading, writing and social studies.

Id. at 11-12, 14.

Neither the National Assessment project nor authors Burton and Jones go so far as directly to attribute black achievement gains to desegregation. It is stated, however, that the findings "cast doubt on judgments that these social programs have failed." Burton and Jones, *supra* at 10.

These recent studies, published after the District Judge's decision, undercut his finding that the black-white achievement gap

has narrowed only "slightly" and that improvement had plateaued in 1975. *See* 492 F.Supp. at 190-91 n. 46. On the contrary, the impact of these studies is that desegregation raises the level of black achievement.

CELEBREZZE, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's decision to affirm the educational components of the district court's plan: the establishment of remediation programs, the creation of a magnet school at West End Junior High School, and the development of an Afro-American studies program. I disagree, however, with my distinguished colleagues and the portion of the decision that reverses the district court's pupil assignment plans. After a careful reading of the record in this case, I believe that the Davidson County community, the board of education, and the district judge are making significant progress towards affording a constitutionally acceptable educational system and that this court should allow the local community and federal court to proceed with their innovations and programs. In my view, the district court did not make clearly erroneous findings of fact and did not abuse its discretion in forming its remedy.

I.

This appeal is part of a desegregation case which has spanned a generation and raises issues concerning the breadth of the district court's discretion and the scope of this court's review. A brief examination of the district court's conclusions is, therefore, necessary.

In 1971, after sixteen years of litigation, the district court adopted a comprehensive desegregation plan which required an "ideal student ratio" of 15 to 35 percent black students in each school and ordered substantial additional busing for the 1971-72 academic year. This court affirmed the 1971 order, reasoning that the decision was within the discretion of the district court.

Kelley v. Metropolitan County Board of Education, 463 F.2d 732 (6th Cir. 1972). The litigation continued intermittently through the 1970's and, in 1979, the district court ordered the parties to reconsider the 1971 desegregation plan in light of the disparate busing burdens, the need to expand the geographic scope of the remedy, and changes in the racial composition of and distribution in the community.

The district court held extensive hearings concerning the effectiveness of the 1971 remedy. The school board established a citizens' advisory panel and a planning team which included outside consultants; after a series of public meetings, the board proposed a new desegregation plan. The plaintiffs responded with objections, recommendations, and suggestions for the district court. The district court heard expert testimony and considered various studies concerning test scores, transportation burdens, and white flight, as well as the social, economic, and educational costs of competing desegregation plans.

In evaluating the possible desegregation remedies, the district court made extensive findings of fact. The court found that the Nashville and Davidson County school system had experienced significant white flight under the 1971 busing order.[1] The court further found that white flight was expected to continue so that 25 to 30 percent of the county's elementary school children would be in private schools by the middle or late 1980's. It emphasized that the flight stemmed largely from the public's perception that the system's educational quality was poor. Second, the court found that although test scores for black and white pupils had improved under the 1971 plan, the gap between

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[1] The extent of white flight under the 1971 busing remedy has apparently been substantial. In June, 1971, 66,393 white students attended Metropolitan Nashville schools; in June, 1979, the number had dropped to 44,295. Based on several empirical studies, the district court concluded that the decline was, at least in part, the result of white flight and the resegregation from the 1971 busing order. 492 F.Supp. at 189-90; 479 F.Supp. at 122-123.

the scores of the two groups had remained constant. Third, the district court found that the school board's proposed desegregation plan placed a disparate burden on black children, especially those in the early elementary grades, by requiring that black children be bused in numbers disproportionate to their share of the population. Fourth, the district court found that extensive busing plans would have substantial social, economic, and educational costs. 492 F.Supp. at 189-92; 479 F.Supp. at 122-23.

Based on these findings, the district court outlined specific guidelines for a new desegregation plan for the county. Initially, the court extended the geographic reach of the plan to include the entire county.[2] It ordered the school board to send children in grades K to 4 to neighborhood schools, maximizing the desegregation within this limitation.[3] It ordered that in grades 5 to 8, the objective should be a minimum presence of 15

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[2] Because of the vast distances in Davidson County, the district court limited the 1971 busing remedy to the densely populated core of the County. After finding that this limitation was hindering the implementation of an effective desegregation remedy, the district court ordered the school board in 1979 to devise a new plan which extended the geographic scope of the busing plan. 479 F.Supp. at 112-23.

[3] In deciding that children in grades K to 4 should go to neighborhood schools, the district court noted that "an objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Swann v. Charlotte-Mecklenburg Board of Education,* 401 U.S. 1, 30-31, 91 S.Ct. 1267, 1282-1283, 28 L.Ed.2d 554 (1971). The district court relied on its detailed findings of fact and concluded that neighborhood schools were necessary for children in grades K to 4.

percent of either race in each school.[4] In addition, the district court outlined various changes in curriculum, staff, and programs for the Nashville school system.

II.

I believe that the majority opinion does not adequately address this district court's findings of fact. With regard to factual questions in desegregation cases, the question on review is whether the findings of fact are clearly erroneous. Fed.R.Civ.P. 52(a). *See Dayton Board of Education v. Brinkman,* 443 U.S. 26, 534 n. 8, 99 S.Ct. 2971, 2977, 61 L.Ed.2d 720 (1979) (*Dayton II*). This court may not reverse findings of fact unless it is left with the firm conviction that a mistake has been made. *Alexander v. Youngstown Board of Education,* 675 F.2d 787, 795-96 (6th Cir. 1982). *See, e.g., Reed v. Rhodes,* 607 F.2d 714, 717 (6th Cir. 1979), *cert. denied,* 445 U.S. 935, 100 S.Ct. 1329, 63 L.Ed.2d 770 (1980); *Penick v. Columbus Board of Education,* 583 F.2d 787, 789, 798 (6th Cir. 1978), *aff'd,* 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979). This court may not deviate from that standard when it addresses factual findings with which it is vaguely dissatisfied. *See Dayton II,* 443 U.S. at 540, 99 S.Ct. at 2980.

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[4] The district court observed that:

> The selection of 15 percent is arbitrary, as is any other number which may be chosen. Preparation of students to live in a pluralistic society makes a biracial, intercultural experience highly desirable. However, it was not the intent of Brown and its progeny to require blacks always to be in the minority; nor should these precedents have been read to require assimilation or amalgamation. It is not undemocratic, nor does it violate equal protection of the laws to have a system that allows for recognition of and respect for differences in our society. A rigid adherence to racial ratios premised upon the social goal of assimilation, which in the process demeans, diminishes, or benignly neglects cultural and ethnic pride as well as differences, is not only constitutionally unrequired, but socially undesirable.

492 F.Supp. at 193.

The majority opinion does not subject the district court's findings concerning disparate busing burdens on black children, loss of community support, heavy economic expenses, and significant educational costs under the 1971 plan to careful scrunity to determine whether they are clearly erroneous. For example, the majority requires the district court to include children in grades K to 4 in its busing plan unless inclusion would "risk the health of the children or significantly impinge on the educational process." *Swann,* 402 U.S. at 30-31, 91 S.Ct. at 1282-1283. The district court, however, did make findings concerning the educational effects of the remedy on young school children and expressly noted the *Swann* exception.[5] In addition, rather than evaluate the findings concerning white flight and its pertinence to the district court's choice of remedy, *see* notes 1-2, *supra,* the majority simply rejects the notion that the threat of flight is a valid reason for failing to adopt any desegregation plan, a question not presented here.[6]

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[5] 492 F.2d at 189-92. *See* note 3, and accompanying text, *supra.*

[6] The threat of white flight may not, of course, be the basis for obstructing a desegregation remedy once a constitutional violation has been found. *See, e.g., Monroe v. Board of Commissioners,* 391 U.S. 450, 459, 88 S.Ct. 1700, 1704, 20 L.Ed.2d 733 (1968). The concern for white flight in cases where a *Swann* remedy has been in operation for some time, as here, does not reflect an attempt to defeat desegregation efforts, but is considered so that the plan will be effective in the long run.

United States v. Scotland Neck City Board of Education, 407 U.S. 484, 491, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1972), indicates that the risk of white flight does not permit a school board to avoid the responsibility of eliminating a dual school system. A district court, however, may consider such a risk in selecting the most desirable plan from among several constitutionally permissible desegregation remedies. In *Stout v. Jefferson County Board of Education,* 537 F.2d 800 (5th Cir. 1976), the Fifth Circuit, in examining the application of *Scotland Neck,* stated:

> We have found no authority declaring that in choosing between various *permissible* plans a chancellor may not elect to minimize

As this court has been previously admonished by the Supreme Court:

> [o]n appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed.RuleCiv.Proc. 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Here, however, as we conceive the situation, the Court of Appeals did neither. It was vaguely dissatisfied with the limited character of the remedy which the district court had afforded plaintiffs and proceeded to institute a far more sweeping one of its own, without in any way upsetting the district court's findings of fact or reversing its conclusions of law. *Dayton I,* 433 U.S. at 417-18 [97 S.Ct. at 2774].

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white boycotts. The teaching of *Scotland Neck* is that he may not refuse to adopt a permissible plan and elect or confect one which preserves a dual system because of such fears. The true issue, then, is whether the plan adopted by the court below was, given the circumstances, a permissible one.

Id. at 802. In this case, the district court evaluated the risk of white flight in determining the *scope* of its busing remedy, not in determining whether to afford a remedy at all. These are entirely separate questions. Other courts have held that the threat of flight is a proper consideration in framing a permissible desegregation plan. *See Johnson v. Board of Education of Chicago,* 604 F.2d 504, 517 (7th Cir. 1979), *vacated for consolidation* ____ U.S. ____, 102 S.Ct. 2223, 72 L.Ed.2d 668 (1982) (a school board may "consider the probability of white flight in formulating a remedial plan to prevent *de facto* segregation in public schools"); *Parent Ass'n of Andrew Jackson High School v. Ambach,* 598 F.2d 705, 719 (2nd Cir. 1979); *Higgins v. Board of Education of the City of Grand Rapids,* 508 F.2d 779, 794 (6th Cir. 1974).

After carefully examining the record and extensive findings of fact in this case, especially those concerning population shifts, educational quality, transportation burdens, and social costs, I am not left with conviction that the district court's factual findings are clearly erroneous.

III.

Furthermore, I believe that the majority has erred in its review of the district court's desegregation remedy. When reviewing a district court's desegregation remedy, we are limited to determining whether the district court abused its discretion.[7] *See Milliken v. Bradley,* 433 U.S. 267, 281, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977); *Swann,* 402 U.S. at 15, 25, 27, 30, 91 S.Ct. at 1275, 1280, 1281, 1282. The Supreme Court has identified the standard for review as the traditional abuse of discretion measure applied to equitable decrees: in a desegregation case, "the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable decrees." *Swann,* 402 U.S. at 15, 91 S.Ct. at 1275. This discretion comports with the policy of leaving the ad-

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[7] The courts of appeals have held that the standard of review in a desegregation case is whether the district court abused its discretion. *E.g., United States v. Board of School Comm'rs of Indianapolis,* 637 F.2d 1101, 1116 (7th Cir.), *cert. denied,* 449 U.S. 838, 101 S.Ct. 114, 66 L.Ed.2d 45 (1980); *Evans v. Buchanan,* 582 F.2d 750, 760 (3rd Cir. 1978) (en banc), *cert. denied,* 446 U.S. 923, 100 S.Ct. 1862, 64 L.Ed.2d 278 (1980); *Stout v. Jefferson County Board of Education,* 489 F.2d 97, 98 (5th Cir. 1974) (per curiam); *Kelly v. Guinn,* 456 F.2d 100, 119 (9th Cir. 1972); *cert. denied,* 413 U.S. 919, 93 S.Ct. 3048, 37 L.Ed.2d 1041 (1979). *See also Arthur v. Nyquist,* 636 F.2d 905, 906 (2nd Cir. 1981).

ministration of desegregation plans with the district courts.[8] "Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these [desegregation] cases can best perform this judicial appraisal." *Brown II [v. Board of Education of Topeka],* 349 U.S. 294 at 299-300, 75 S.Ct. 753 at 755-756, 99 L.Ed. 1083.

I disagree with the majority's view of the district court's discretion. The majority implies that the district court is obligated to employ a racial ratio which matches the racial composition of the Davidson County school system. My reading of *Swann* is that the district court *may* adopt such a ratio as part of a desegregation remedy. The Constitution does not require the district court to use a ratio which mirrors the racial makeup of the community. *Swann,* 402 U.S. at 23-24, 91 S.Ct. at 1279-1280. Rather, the district court may use its discretion to

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[8] This court may reverse a district court in its formulation of a desegregation remedy only when it has abused its discretion, because the district court is in the best position to weigh the competing equities.

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Hecht Co. v. Bowles, 321 U.S. 321, 329-30, 64 S.Ct. 587, 591-592, 88 L.Ed. 754 (1944), cited in *Brown II,* 349 U.S. at 300, 75 S.Ct. at 756, and *Swann,* 402 U.S. at 15, 91 S.Ct. at 1275. *See Lemon v. Kurtzman,* 411 U.S. 192, 200, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1972) ("[i]n shaping equitable decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow").

determine the proper scope of a busing plan in a desegregation remedy.[9]

The majority's treatment of the pupil assignment component of the desegregation plan is not consistent with the limited scope of our review. The district court did use in 1971, as a "starting point," the approximate racial ratio of the school district as an objective for its busing plan. The district court in 1980 reviewed the effectiveness of the 1971 order. After hearing and evaluating a broad range of evidence concerning white flight, test scores, transportation burdens, costs, education theory, and other factors, the district court changed the busing objective to minimum presence of 15 percent of either race.

The majority opinion seems to recognize that there is no constitutional right to any particular racial balance in schools. *See Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 434, 96 S.Ct. 2697, 2703, 49 L.Ed.2d 599 (1976) (no "substantive constitutional right to a particular degree of racial balance or mixing" exists); *Swann,* 402 U.S. at 24, 91 S.Ct. at 1280. Yet the majority's requirement that the district court employ a ratio of 68 percent white and 32 percent black (plus or minus 15 percent) appears to be an attempt to establish such a balance. I fear that the precise racial mixture required by the majority on remand will, as a practical matter, create such a right. *See Dayton Board of Education v. Brinkman,* 433 U.S. 406, 418, 97 S.Ct. 2766, 2774, 53 L.Ed.2d 581 (1977) (*Dayton I*).

Moreover, I disagree with the majority's treatment of the pupil assignment component for grades K to 4. The majority re-

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[9] The Eighth Circuit has expressly rejected the argument that the desegregation plan for the St. Louis school system must precisely reflect the racial composition of the district. The district court adopted a pupil assignment plan which considered schools with black enrollment of 30 to 50 perent (plus or minus 15 percent) in a system which is 76 percent black. The appellate court found that such deviations are within the discretion of the district court. *Liddell v. Board of Education of St. Louis,* 667 F.2d 643, 649 (8th Cir. 1981).

jects the district court's decision on the premise that it is required to desegregate all schools and all grades within the school system. I do not believe that the district court's discretion is so narrow. The cases on which the majority relies for it proposition do not support its conclusion.[10] In *Haycraft v. Board of Education of Jefferson County,* 585 F.2d 803 (6th Cir. 1978), *cert. denied,* 443 U.S. 915, 99 S.Ct. 3107, 61 L.Ed.2d 879 (1979), this court reversed a district court which excluded first grade students from a busing plan. In *Haycraft,* the district court made no factual findings; instead, it concluded "as a matter of law" that first grade students without kindergarten experience would risk failure if they rode on a bus to school. *Id.* at 804. Here, the district court made extensive factual findings, supported by the record, and grounded his decision on the risk that the entire desegregation remedy might fail in the long run if very young children were included in the busing program. 492 F.Supp. at 189-93. *Lee v. Macon County Board of Education,* 616 F.2d 805 (5th Cir. 1980), does not hold that every grade in a school system must be included in a desegregation remedy. In fact, the Fifth Circuit reasons that "[f]ocusing on the target of a unitary system rather than a systemwide racial balance, the

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[10] The majority's reliance on *Tasby v. Estes,* 572 F.2d 1010 (5th Cir. 1978), *cert. dismissed as improvidently granted,* 444 U.S. 437, 100 S.Ct. 716, 62 L.Ed.2d 626 (1980), is misplaced. First, the circuit court did not hold that *Swann* requires all schools and all grades to be included in a pupil assignment program. It remanded the case because the district court, unlike the lower court in this case, failed to make adequate factual findings. *Id.* at 1014. Second, the Fifth Circuit has expressly ruled that a district court "may devise a constitutional plan that temporarily or permanently leaves one or more racially identifiable elementary schools, or that omits some of the earlier grades from the busing program." *Lee v. Macon County Board of Education,* 616 F.2d 805, 812 (5th Cir. 1980). Third, the Supreme Court's decision to dismiss certiorari as improvidently granted provides no indication of the Court's view of the merits and gives the *Estes* decision no precedential power binding on this court. *See Griffin v. United States,* 336 U.S. 704, 716, 69 S.Ct. 814, 819, 93 L.Ed. 993 (1958); *United States v. Carver,* 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361 (1923).

court may devise a constitutional plan that temporarily or permanently leaves one or more racially identifiable elementary schools, or that omits some of the earlier grades from the busing program." *Id.* at 812. *See generally Swann,* 402 U.S. at 24, 91 S.Ct. at 1280 ("[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole").

Finally, the majority fails to address directly the issue of the effectiveness of the desegregation plan.[11] "The measure of any desegregation plan is its effectiveness." *Davis v. School Comm'rs of Mobile,* 402 U.S. 33, 37, 91 S.Ct. 1289, 1291, 28 L.Ed.2d 577 (1971). District court decrees must ultimately be evaluated on the basis of their effectiveness. *See Green v. County School Board,* 391 U.S. 430, 439, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968) (desegregation remedies must be drawn "in light of the circumstances present and the options available"); *Davis,* 402 U.S. at 37, 91 S.Ct. at 1291 (desegrega-

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[11] The Supreme Court's opinion in *Washington v. Seattle School District No. 1,* ____ U.S. ____, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), does not address the issues raised in this appeal. In *Washington,* the Court found that a state referendum which prohibits mandatory busing of school children for purposes of integration violates the equal protection clause of the fourteenth amendment. *Washington* concerns the structure of the state and local political process, rather than the breadth of a district court's discretion in shaping a desegregation decree: "[i]t is the State's race-conscious restructuring of its decision-making process that is impermissible." ____ U.S. ____, ____ n.29, 102 S.Ct. 3187, 3203 n.29. The Supreme Court has recently reiterated the policy of encouraging flexibility in desegregation remedies and avoiding rigid approaches: "although 'in some circumstances busing will be an appropriate and useful element in a desegregation plan,' in other circumstances 'its "costs," both in financial and educational terms, will render its use inadvisable.' " *Crawford v. Los Angeles Board of Education,* ____ U.S. ____, ____, 102 S.Ct. 3211, 3220, 72 L.Ed.2d 948 (1982), *quoting Crawford v. Board of Education,* 17 Cal.3d 280, 309, 139 Cal.Rptr. 724, 551 P.2d 28 (1976). *See* at ____ n.3, ____ n.15, 102 S.Ct. at 3214 n.3, 3218 n.15.

tion remedies must "tak[e] into account the practicalities of the situation"). An effective desegregation plan is one which will establish a unitary school system: "The obligation of the district courts . . . is to access the effectiveness of a proposed plan in achieving desegregation." *Green,* 391 U.S. at 439, 88 S.Ct. at 1694. Many factors should be considered in determining whether a particular plan will be effective in establishing a unitary school system. These factors include population shifts,[12] transportation burdens, and the social, economic, and educational costs of competing desegregation plans. The precise weight to be accorded to each factor should be left to the district court's discretion. In my opinion, the district court has properly identified and weighed these various factors and has selected a desegregation remedy which is likely to move Davidson County towards a unitary school system.[13] If lasting solutions for the problems of desegregation are to be found, we must allow the district courts to shape remedies which reflect the practical problems facing a school system and which have a realistic chance of achieving the goals of *Brown I.*

A careful reading of the entire record, and my experience with the previous appeals filed in this litigation, leads me to believe that Judge Wiseman has addressed a difficult problem and is, together with the local community, making a sincere effort to bring a degree of finality to this longstanding issue. I believe that the district court's plan complies with the re-

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[12] *See* notes 1 and 6 and accompanying text, *supra.*

[13] The majority relies on *Tasby v. Estes,* 572 F.2d 1010 (5th Cir. 1978), *cert. dismissed as improvidently granted,* 444 U.S. 437, 100 S.Ct. 716, 62 L.Ed.2d 626 (1980), asserting that the dismissal of certiorari as improvidently granted is an indication that the Supreme Court supports the majority's interpretation of *Swann.* Although the Court's disposition allows no such inference to be drawn, *see* note 10, *supra,* Justice Powell's dissent, joined by Justices Rehnquist and Stewart, is of interest. The dissent emphasizes the need for flexibility and practicality in reviewing desegregation decrees.

quirements of *Brown I* and *Swann*. The district court's findings of fact are not clearly erroneous and it has not abused its broad discretion in fashioning the flexible and innovative plan presented to this court. Accordingly, I would affirm the judgment of the district court.

APPENDIX F

Robert W. Kelley, et al.,

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.,

v.

State of Tennessee, et al.

Nos. 2094, 2956

United States District Court,
M. D. Tennessee,
Nashville Division.

April 17, 1981.

In a school desegregation case the board of education proffered its desegregation plan to which plaintiffs objected and proposed their own plan. The District Court, Wiseman, J., rejected plaintiffs' proposed plan as haphazardly constructed and unworkable and approved board's plan which included educational components and pupil assignment components.

Board's plan ordered adopted.

Avon N. Williams, Jr., Richard Dinkins, Nashville, Tenn., for plaintiffs.

William R. Willis, Jr. and Marian F. Harrison, Nashville, Tenn., for defendant Metropolitan Bd. of Ed.

Frank J. Scanlon, Senior Asst. ATty. Gen., Nashville, Tenn., for third-party defendant State of Tenn.

MEMORANDUM

WISEMAN, District Judge.

This Court's Memorandum Opinion and Order of May 20, 1980, directed the Defendant Board of Education to develop a new desegregation plan following certain specific directives and guidelines regarding educational components and pupil assignment as set forth in that Opinion.[1] Those directives and guidelines resulted from many days of testimony beginning in the summer of 1979, and culminating in over 25 trial days in March and April of 1980. After the lengthy hearings, this Court determined that a different remedy for the remaining vestiges of segregation in Nashville was required, in view of the "tortuous twenty-five year history of desegregation efforts in Metropolitan Nashville," and the specific burdens and benefits found to emanate from the *Swann* remedy–ordered by this Court and implemented by the Defendants in 1971. This Opinion considers the plan offered in the Board's effort to comply with the May 20, 1980, Order, and the Plaintiffs' proposals and objections relating to the ordered plan.

THE RECORD PRIOR TO THE 1981 HEARINGS

Prior to this Court's Order of May 20, 1980, many matters had gone unresolved in this litigation since 1971.[2] The Plaintiffs had filed several ogjections to the operation of the Court-ordered 1971 plan, which objections were addressed primarily to alleged disparate burden in transportation of young black children. As a result of these objections, along with other factors such as the Board's need for additional classroom space in the outlying areas not involved in the 1971 plan,[3] and the ever-

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[1] *See, Kelley v. Board of Education,* 492 F.Supp. 167 (M.D.Tenn.1980).

[2] *Kelley v. Board of Education,* 492 F.Supp. 167, 168-75 (M.D.Tenn.1980).

[3] The 1971 *Swann* remedy left a ring of schools in the outlying areas untouched by the plan because of the distances involved in transportation to and from these schools.

increasing costs of transportation under the plan, the Court ordered the Board, on August 27, 1979, to develop a new desegregation plan for the entirety of Davidson County.[4] After many weeks of Board deliberation and community input at the Board level, the "Waldrip Plan"[5] was presented for the Court's scrutiny. The Plaintiffs were invited by the Court to submit an alternative plan, but this offer was ultimately declined. Instead, the Plaintiffs chose to rest their case on specific criticisms leveled at the Waldrip Plan by the Plaintiffs' expert witness, Dr. Hugh Scott. A group of intervenors were also permitted to file a plan.

Consideration of the two plans, along with the Plaintiffs' objections, resulted in the Court's rejection of both plans, and in the Court's directive to the Board to develop another plan following the specific guidelines set forth in the Court's Opinion. Based on the testimony offered during the hearings on the two plans, this Court made an effort to carefully balance the benefits and burdens imposed by the *Swann*-type remedy employed in the 1971 Order and in the Waldrip Plan, and set forth the following directives for inclusion in the new Board proposal:

I. *Educational Components.*

A. Intercultural experiences for children in predominately one race schools.

B. Reduced pupil-teacher ratios in schools having achievement levels below the average for the system.

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[4] *Kelley v. Board of Education,* 479 F.Supp. 120 (M.D.Tenn.1979).

[5] The planning team for the Board was headed by Dr. Donald Waldrip, whose qualifications were set forth in the Court's Memorandum Opinion of May 20, 1980. *Kelley v. Board of Education,* 492 F.Supp. 167, 177 (M.D.Tenn.1980).

C. Remediation efforts in schools or classes made up largely of socioeconomically deprived children who suffer the continuing effects of prior discrimination.

D. Black history and black culture curriculum.

E. Teacher in-service training in preparation for the implementation of the plan.

F. Magnet school(s) offering unique educational opportunities.

G. Middle school programs.

II. *Pupil Assignment.*

A. A three-tiered system of grades utilizing K-4, 5-8, 9-12, or some reasonable variation thereof.

B. Schools having a neighborhood character for the lower elementary grades without the use of non-contiguous zoning arrangements.

C. Middle schools having a minimum 15% representation of either race, utilizing non-contiguous zoning where necessary.

D. Use of the closest other race population for necessary non-contiguous zones.

E. High school zones in conformity with the Court's directive, including closing and/or changing the use of Bellevue, Joelton, DuPont, Antioch, Madison, Pearl, and Cohn high schools.

F. Construction of the Goodlettsville-Madison and Pearl-Cohn Comprehensive high schools, with the corresponding closure or change in use of Goodlettsville, Madison, Pearl, and Cohn.

G. Delay the addition to Maplewood High School and consider adjustments to the Whites Creek zone and the impact of proposed magnet school enrollments to accommodate the large enrollment at Maplewood.

On June 25, 1980, the Defendant Board of Education made a preliminary report to the Court regarding a timetable for implementation of the Court's Order. Pursuant to what the Board representatives deemed to be the suggestion of the Plaintiffs, the Board's proposed timetable included a plan whereby first graders could remain in the school wherein they attended kindergarten, thereby presumably aiding in the transition between kindergarten and first grade.[6] A hearing was held on the proposed timetable for implementation, and the Plaintiffs objected to the rezoning of first graders during the interim. Following the hearing on July 15, 1980, the Court entered an Order rejecting the first grade proposal, approving the remainder of the timetable for the pupil assignment components, and relieving the Defendants of the obligation to confer with representatives of the Plaintiffs and Intervenors during the planning process.[7]

The Board filed its proposed desegregation plan on January 19, 1981.[8] Following the filing, this Court directed the Plain-

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[6] Dr. Hugh Scott, expert witness for the Plaintiffs, testified extensively about the need for a smooth transition between these grades.

[7] The Court also ordered the Board to reconsider its decision to permit 12th graders to remain at Bellevue and Joelton, while closing those high schools to other grades pursuant to the Court's directive. The Board subsequently voted to close those schools as high schools for the school year 1980-1981, which was reported to the Court on July 25, 1980.

[8] Counsel for the Board noted in a response to the Plaintiffs' later request for additional time to respond to the plan and in the hearings on March 30, 1981, that the Plaintiffs had access to the plan long before January 19, 1981. Specifically, Board counsel stated as follows: Details of the proposed plan were widely aired in public meetings during November and December, 1980. On or about December 15, 1980, after the approval of the long range pupil assignment plan by the Board, a copy of the statistical data supporting the plan was forwarded to the Plaintiffs, and an invitation to view the bulky maps, which had not yet been duplicated, was entended to the Plaintiffs by Board counsel. The entire package of maps and

tiffs and the Intervenors to respond by way of specific objections to the plan by February 9, 1981. The Intervenors moved for leave to withdraw from active participation in the hearings on the new plan, and this motion was granted.

On or about February 6, 1981, the Plaintiffs moved the Court for additional time to file objections up to and including March 31, 1981. Accompanying that motion was an initial submission of objections, and an indication that the Plaintiffs had not been able to meet with one or more possible expert witnesses regarding the plan. The motion was granted in part, extending the time for esponding until March 16, 1981, with the notation that any hearings, if necessary, on the plan and objections would begin on March 30, 1981, and would continue therafter until concluded.

On March 10, 1981, the Plaintiffs filed a second motion for extension, based on the fact that the Plaintiffs' lead counsel was ill and hospitalized. From this motion, and from a status conference on or about March 10, 1981, attended by Plaintiffs' counsel, this Court and the Defendants learned for the first time that an alternative plan was contemplated by the Plaintiffs. The request for an extension was granted until March 25, 1981, giving the Plaintiffs leave to reapply for an extension if counsel's health had not improved. The Order contained a further notation that hearings remained scheduled for March 30, 1981.

On March 25, 1981, the Plaintiffs filed their supplemental response, along with an alternative plan. On March 27, 1981, the Defendants moved to strike the Plaintiffs' plan and to affirm the Board's plan without a hearing. The Court then ordered a hearing on all pending motions for determination of status of the case for March 30, 1981.

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statistical information was forwarded to the Plantiffs on or about January 12, 1981, with the remainder of the plan, including the interim proposals and educational components, being delivered to the Plaintiffs on January 19, 1981. No exception was taken to this representation of the events by Plaintiffs' counsel.

THE PLAINTIFFS' PROPOSED PLAN

On March 30, 1981, the Court heard the Board of Education's "Motion to Strike Plaintiffs' 'Conceptual' Pupil Assignment Plan and to Approve Defendants' Proposed Plan Without Hearing." The Court construes this motion as one made under Rule 12(f), Federal Rules of Civil Procedure, as a motion to strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

The primary basis for the Board's motion to strike the Plaintiffs' plan and certain objections to the Board's plan is that the primary thrust of the Plaintiffs' response constitutes an attack on the Court's Order of May20, 1980, rather than an effort to produce a plan to comply with the Court's Order. In addition, the Board argues that the Court's Order of May 20, 1980, was in large measure based upon the testimony of the Plaintiffs' own expert witness, Dr. Hugh Scott. An examination of the Plaintiffs' plan and many of their objections reveals that the Board's position is substantially correct.

The Plaintiffs' proposed plan recognizes from the outset that elementary children will be transported long distances outside their neighborhoods, contrary to the Order of May 20, 1980. Furthermore, the elementary pairings were developed so as to closely approximate the current ratios existing in the community. The pairings and clusterings necessitate at least a four-tiered grade structure (which is inconsistent with the position taken by the Plaintiffs at the hearing), with students attending at least two elementary schools, one middle school, and one high school. Some students would attend three elementary schools since kindergarten is often separated from grades one and two. (Exhibit 284, offered for Identification).

In designing their elementary and middle school pairings and clusterings, the Plaintiffs have used the same method rejected by the Court in the form of the Waldrip Plan previously presented by the Board. Both the Waldrip Plan and the Plain-

tiffs' plan use "more-of-the-same remedy" employed by the Court in 1971, and rejected by the Court in 1980.[9] This Court made a specific factual finding that this remedy is no longer appropriate in Nashville, after carefully weighing benefits against burdens and the nine year operational history of the school system under the *Swann*-type remedy.

A large portion of this Court's Order of May 20, 1980, consisted of this balancing process—weighing the benefits of the *Swann*-type remedy against its burdens. The costs and burdens were largely derived from the testimony of Dr. Hugh Scott, the Plaintiffs' expert witness. He testified to the educational importance of a three-tiered school system, and the deleterious effect of disrupting a child's early education by splitting the primary grades among different schools. He testified further to the importance of parental involvement in early childhood education, which he felt could only be fostered by having the schools in such a location that the parent could frequently visit the school, talk with teachers, become personally involved, and contribute services. He also testified that the "osmosis effect" or "rightness of whiteness" approach to desegregation mandating a given racial percentage in each school and rejecting predominately black schools was inherently racist and without educational validity.

[1] This Court was impressed by Dr. Scott's testimony and relied upon it, only to have an elementary school plan proposed by the Plaintiffs which was totally contrary to this most persuasive testimony. Since the elementary portion of the Plaintiffs' plan on its face constitutes nothing more than an attack on the Court's Order of May 20, 1980, and is contrary to the Plaintiffs' own expert proof, it is stricken as impertinent and

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[9] This is where that similarity stops, however. The Waldrip Plan was fully fleshed out with improved feeder patterns and as little transportation as possible under a proposed *Swann*-type remedy. This is not the case with the Plaintiffs' plan.

unresponsive to the Court's directive under Rule 12(f), Federal Rules of Civil Procedure.

While the obvious failure of the Plaintiffs' elementary school proposal to comply with the Court's Order of May 20, 1980, precluded testimony on that portion, the Court did permit the Plaintiffs to present their middle school plan, which their new expert witness, Dr. William M. Gordon,[10] stated was independent of the elementary school portion.[11]

Throughout Dr. Gordon's testimony, it was apparent that all portions of the Plaintiffs' proposed plan, including the middle school plan, were hastily drawn by consultants[12] who had little or no familiarity with the demography, the major arteries, the location of children, the capacities of buildings, and other pertinent information. Further, the consultants who participated in the drawing of the Plaintiffs' plan did not take time to study these variables or to visit the city for any appreciable length of time. Dr. Gordon admitted that an entire chapter of his book regarding desegregation in America was devoted to the importance of knowing these crucial details regarding a city when preparing a desegregation plan.

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[10] Dr. Gordon is a Professor in the Department of Educational Leadership, Miami University, Oxford, Ohio. (Exhibit 280). He is a member of HGH Associates, an educational consulting firm specializing in desegregation plans.

[11] The Plaintiffs did not propose an alternative high school plan, thus apparently accepting the Board's proposal for high schools.

[12] In addition to Dr. Gordon, see note 10 *supra*, Dr. Larry W. Hughes (Exhibit 281), and Dr. James B. Andrews (Exhibit 282), participated in the drawing of the Plaintiffs' desegregation plan. Dr. Hughes and Dr. Andrews are also members of HGH Associates.

The Plaintiffs' middle school plan is superficial at best. The consultants merely paired the Board's proposed elementary zones into middle schools, with a total lack of regard for building capacities and the distances between non-contiguous zones for the schools. No projected enrollments were set forth in the Plaintiffs' plan, and accordingly, it was impossible to evaluate how well the mechanics of the system would work. Mr. Ray Osborne, Director of Zoning and Real Property for the Board of Education, calculated enrollments for the Plaintiffs' middle schools and found numerous schools to be overcrowded.[13]

An examination of the map depicting Plaintiffs' middle school plan (Exhibit 266), reveals numerous instances of unreasonable zoning arrangements for both races. For example, students in the Cumberland non-contiguous zone on the Sumner County line would be required to ride to a zone on the Cheatham County line to attend Cumberland. Students in the Antioch non-contiguous area in the innercity would be transported to Antioch in southwest Nashville. Students in the Joy and Stratton areas would be transported across the Cumberland River to Donelson. Students in the Ross area near the central city would be required to ride to Goodlettsville.

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[13] For example, it was calculated that Meigs Middle School would have an enrollment of 1348, with a capacity of 850, that Rose Park Middle School would have an enrollment of 1235, with a capacity of 690, that McMurray would have an enrollment of 1280, with a capacity of 926. Other schools were apparently severely underutilized. For example, Moore would have an enrollment of 404, with a capacity of 906, Pearl would have an enrollment of 852, with a capacity of 1295, and Cohn would have an enrollment of 744, with a capacity of 1136.

Other pairings are similarly unreasonable,[14] but in all there is an apparent disregard for distances, for the location of rivers, for bridges, and for major thoroughfares. On cross-examination, Dr. Gordon could not show the Court how a bus would travel from one of these distant zones to another, thereby indicating a total lack of familiarity with such practicalities.

The middle school plan also fails to abide by the Court's Order of May 20, 1980, as well as the testimony of Dr. Scott, the Plaintiffs own expert witness. Indeed, the testimony of Dr. Gordon revealed that his "theory" of desegregation was totally contradictory to that of Dr. Scott. While Dr. Scott had previously rejected the racial balance approach, had attacked the validity of the theory that black children must sit beside white children to learn, and had applauded the idea that black schools were not inherently bad. Dr. Gordon's testimony and the middle school plan presented by the Plaintiffs take the opposite position.

Dr. Gordon and his associates sought specifically to structure school zones reflecting the racial makeup of the community. Blacks are in the majority in only one of the Plaintiffs' proposed 24 middle schools.[15] In drawing the zone lines in this fashion, Dr. Gordon created the impractical transportation routes described above. The Plaintiffs' plan does not comply with the Court's order that middle schools should have a minimum of 15% either race, which was a modification of the racial balance approach based on the Plaintiffs' previous position expresssed by their expert witness, Dr. Hugh Scott.

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[14] In addition to those set forth in the text, see the remaining pairings on the map, Exhibit 266:

Wright	—	Glencliff, Early, Brookmeade
Meigs	—	Warner, Glengarry, Hickman, Haywood
Apollo	—	Una, Kirkpatrick, Fall-Hamilton
Rose Park	—	Carter-Lawrence, Berry, Lakeview

[15] Pearl.

From all of the above, it is apparent from the middle school plan, as from the elementary school plan, that the Plaintiffs have not complied with the Court's Order of May 20, 1980. The plan they have created is at best haphazardly constructed and unworkable. Accordingly, the Plaintiffs' middle school plan is rejected.

THE BOARD'S PLAN

[2] As the Court decreed in its Order of May 20, 1980, the Board of Education's plan consists of two parts—the educational components and the pupil assignment components.

I. *The Educational Components.*

The responsibility for developing the educational components was divided into six bi-racial committees of central office staff members, teachers, and citizens, for each of the various subcomponents: (1) K-4 remediation; (2) multicultural/intercultural exchange; (3) magnet schools; (4) black history; (5) middle schools. (Exhibit 273). The timetable for development of the various components was approved by this Court on July 15, 1980, and the committees' work has substantially complied with the time frame set forth, with the possible exception of the magnet school proposal discussed more fully, *infra*.

In line with the Court's directive, the Board has proposed a K-4 Intervention/Remediation Program, which will be directed toward those schools or classes where the achievement levels arebelow the average for the system and/or where the majority of a school's population is made up largely of socio-economically deprived children who suffer the continuing effects of prior discrimination. The cornerstone of this proposal is the transition class whereby students who meet the Court's criteria and who are unable to perform at grade level in the normal classroom setting will be placed in a transition class at the end of kindergarten and/or first grade. The students will stay in

these half-step classes for one semester or the entire year, depending upon their needs. Here, pursuant to the Court's directive, adult-student ratios will be lowered, and the cost borne in part by decreased transportation costs associated with the K-4 schools having a neighborhood character.[16] Ms. Lucille Nabors, Assistant Superintendent for Program and Staff Development, testified at length about these programs, and stated that they were ready for implementation in those elementary schools included in the approved interim plan, discussed *infra*. Other remediation programs planned by the staff include basic development curriculum in math, language arts, and reading. (Exhibits 277, 278, part 1, pp. D-1—D-4, and part 2).

The Plaintiffs filed only two objections relating to the intervention/remediation program. Specifically, plaintiffs argued that the program should not be limited to grades K-4, and that it should not be paid for with Title I funds. (Objection 1(d), March 25, 1981, and Objection 1(e), March 25, 1981). From the exhibits and from the testimony of Ms. Nabors, it is apparent that remediation efforts in the system are currently directed toward all grades. (See Exhibit 278, part 1, at D-1). However, the Court's Order was directed only to remediation in grades K-4, in order to maintain the delicate balance set forth in that

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[16] In the Board's pleading accompanying their plan is the notation that on January 13, 1981, the Board of Education adopted a resolution made by Mr. George Cate and seconded by Mrs. Barbara Mann regarding funding of the educational components. This motion reads as follows: "I move that the Board adopt as a policy that to the extent that money is saved in 1981 and later years in transportation by adoption of the K-4 neighborhood plan, that such funds be applied to the educational component of the plan with priority to the K-4 intervention-remediation program, and that the staff be directed to follow that policy and consider the specific guidelines set down by the Court in its opinion as budgets for the ensuing years are prepared and submitted to the Board."

Order.[17] Moreover, inherent in the Court's Order is the recognition that when remediation is effective in the lower grades, there should be less need for it in the upper grades.

Plaintiffs' objection regarding Title I funds is also not well taken. Ms. Lucille Nabors testified that the Defendants are cognizant of the Title I Regulations and statutes, which at this time appear to preclude the use of Title I funds for educational components of court-ordered desegregation plans. The plans proposed by the Board for implementation under the Court's Order will be funded fully with state and local funds. In fact, those students the Plaintiffs would wish to receive remedial services will be receiving twice the amount of such services, from the local level and from the federal level.

The Court's Order of May 20, 1980, directed the Board to plan intercultural experiences for students in those schools which, because of the Court's cost-benefit analysis, would attend predominately one race schools. Based upon the testimony of Ms. Nabors, and the voluminous exhibits presented, the Court is satisfied that the Board has met this criteria, and has used its initiative to develop intensive programs which the professional staff deem valid and educationally sound.

Dr. Hugh Scott, the Plaintiffs' expert witness, testified at length about the trend toward and the need for multicultural education directed toward the recognition of cultural diversity in a pluralistic society. The multicultural committees have developed a detailed program along the lines of Dr. Scott's suggestion. This program will eventually be offered in every school, grades K-12. (Exhibit 278, part 1, A-4). A curriculum

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[17] The neighborhood character of the K-4 schools will permit increased parental involvement in every school, a concept espoused by Dr. Hugh Scott and capitalized upon by the Board's proposal to provide parental training to increase support for target children. (Exhibit 278, part 1, at D-3—D-4).

guide for grades K-6 has alrady been developed and will be ready for use in those grades in 1981-1982 (Exhibit 276). Ms. Nabors testified that a similar guide for grades 7-12 is to be developed in the near future.

An intercultural exchange program is also planned pursuant to the Court's directive for those K-4 schools that will be predominately one race. These programs must, of necessity, be tailored to the individual schools and staffs involved, and these programs will be operational in the predominately one race schools under the interim plan in 1981-1982.

The Plaintiffs filed only one objection with regard to the multicultural-intercultural exchange program proposed by the Board, which objection was not specific in nature. Objection 1(a) (March 25, 1981) indicates that the Plaintiffs accept the goals and objectives of the multicultural program, but insist that sufficient detail was not supplied. The testimony of Ms. Nabors and exhibits previously mentioned satisfy the Court that the validity of the planned programs has been shown and that the programs are in full compliance with the Court's directives of May 20, 1980.

The magnet school proposal presented by the Board did not satisfy the Court's desire to have at least one such alternative program[18] implemented immediately. The delay was not based upon lack of curriculum development, since plans for an academic magnet school were well under way at the time this Court approved the Board's time-table for implementation of the plan on July 15, 1980. The Board felt the program should be delayed until a suitable building for such a 7-12 grade school could become available. This problem has been obviated by the

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[18] The Board's plan proposed to continue the operation of Hume Fogg High School as an open zoned school with grades 9-12 for the school year 1981-1982. This proposal includes the Board's intention to re-evaluate the continuation of Hume Fogg on an annual basis. This proposal is approved.

adoption of the modified interim pupil assignment plan, discussed *infra*. The Court questioned Ms. Nabors at length about the time necessary to implement the planned academic magnet school for 1981-1982 in the event a suitable building could be found. While Ms. Nabors and her committees understandably felt that more time than is available between now and the beginning of school in the fall of 1981 would be preferable for the selection of staff and students, she did testify that the task could be completed. Based on that representation, and the desire of this Court to minimize the delay in implementing as much of this plan as possible, the Court now orders that the proposed academic magnet school, to be located at the present West End Junior High School, be implemented for the coming school year, beginning with grades 7 and 8, and adding a grade each year thereafter.

The plaintiffs only objection to the magnet school proposal outlined by the Board is directed toward the student selection procedure to be employed for such school. While the Board did not intend to use its selection procedure for the coming year, the Court is impressed by the mechanism developed for such selection (Exhibit 274), which includes achievement test scores, teacher ratings, and school records. These criteria will insure sufficient flexibility to provide equal access to all races, contrary to the Plaintiffs' objection. This objection is accordingly overruled.

The Black History or Afro-American Studies Program ordered by the Court in its Order of May 20, 1980, is presently in operation, having been offered in the high schools for the first time in the fall of 1980. The Court finds the curriculum guide for this course to be most adequate. (Exhibit 275). This course, along with continuing efforts to include such studies in the regular curiculum and to screen curriculum and textbooks for sensitivity to the heritage of black Americans, and the multicultural program for all grades discussed previously, complies with this Court's directive. The Plaintiffs' objection

relating to the lack of specificity and to general curriculum considerations is overruled. (Objection 1(c), March 25, 1981).

The educational considerations inherent in the move toward middle schools pursuant to the Court's directive were addressed extensively by Ms. Nabors and set forth in the exhibits. (Exhibit 278, part 1, Section E). The implementation of the middle school philosophy with its emphasis on bridging the gap between elementary and high school should go a long way toward meeting this Court's directive to concentrate on quality education and to increase community perceptions thereof.[19]

The final educational component ordered by the Court concerns in-service training of faculty and staff members for successful implementation of the plan. No pertinent objection has been filed by the Plaintiffs to this component.[20] From the testimony and the materials presented, this component is well developed, providing a continuation of the on-going "Together We Can ... Together We Will" program previously lauded by this Court, and for new programs related to the desegregation order. (Exhibit 278, part 1, pages G-1—H-30). It is, therefore, approved as complying with the Court's Order of May 20, 1980.

In view of the foregoing discussion and findings, the educational component package as presented by the Board, with the modification regarding the academic magnet school beginning with grades 7-8 in 1981-1982, is approved as complying with this Court's Order of May 20, 1980.

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[19] No objections were filed by the Plaintiffs relating to the educational component for middle schools.

[20] The Plaintiffs' only objection to the administrative and staff development portion of the plan relates not to the in-service educational component, but to affirmative action plans for staff and administrative positions. While this was part of the Court's Order of May 20, 1980, the Court has reserved the personnel issue for a later date, and accordingly, no proof has been presented by the Board regarding its affirmative action plans.

II. *PUPIL ASSIGNMENT COMPONENT*

Two proposals were made by the Board for pupil assignment, the long range plan for implementation in 1984, and the interim plan for implementation in 1981-1982. As detailed, *infra,* the long range plan is approved as in conformity with the Court's Order of May 20, 1981; the interim plan is modified to include an expanded zone of implementation for 1981-1982.

A. *The Long Range Plan.*

The Board's long range proposal for elementary schools, Exhibits 268 and 271, fully complies with the Court's directive to establish a system of K-4 or K-5 elementary schools of a neighborhood character, all the while maximizing opportunities for integration in a neighborhood setting. Of the 75 K-4 elementary schools proposed, Mr. Osborne estimates that approximately 31 of these schools will be walk-in schools requiring no transportation, as compared to only five at the present time. This should permit increased parental participation deemed so important by this Court and by the Plaintiffs' own expert witness, Dr. Hugh Scott.

In drawing the school zone lines for elementary schools, Mr. Osborne and his bi-racial committee committed themselves to maximizing integration as much as possible without the use of non-contiguous zones, and the results were surprising. No K-4 school is projected to be 100% white.[21] It should be noted here that while the Plaintiffs' plan was stricken from the record, it contained a proposal to leave some of these distant outlying schools untouched by the Plaintiffs' own desegregation plan. (*See,* Plaintiffs' Exhibit Number 284 for Identification).

Approximately 20 of the elementary schools are projected to be within the 15% black or white ratio established by the Court

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[21] Gateway, Hickman, Joelton, Sylvan Park, and Union Hill. (Exhibit 268).

for middle schools. Those schools which fall outside this percentage will benefit from the intercultural exchange program discussed above.

The Court is satisfied that the elementary school plan meets the Court's Order of May 20, 1980, and all the Plaintiffs' objections relating to it have no bearing on the question of compliance with the Court's mandate.[22]

The middle school plan approved by the Board contemplates the creation of 24 middle schools serving grades 5-8 in 1984. (Exhibits 268 and 269). According to the testimony of Mr. Osborne, the Board began its consideration of the middle school plan by locating suitable buildings for the unique middle school program, as outlined by the Middle School Educational Component Committee.

After the schools were selected, zones were constructed to comply with the Court's mandate to achieve at minimum a 15% representation of either race in the middle schools. Under the Board's proposal, four middle schools are not projected to fall within this 15% black/white range in 1981: Donelson (14.8% black/white range in 1981: Antioch (14.0% black), and Wright (11.7% black). These schools may well fall within the 15% range by 1984, and to require their technical compliance with the suggested ratio at this time would necessitate the rezoning of black children from neighborhood middle schools into these middle schools. In drawing the middle school zones, the Board used non-contiguous zones only where necessary, and as demonstrated by Mr. Osborne, chose the closest other race population to constitute the non-contiguous zones wherever practical.

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[22] Plaintiffs' Objection (3)(a) (February 6, 1981) and Objection 2 (March 25, 1981) attack the neighborhood character of the elementary school proposal. Again, this constitutes an attack on the Court's Order rather than an effort to achieve compliance with it. Accordingly, these objections are stricken under Rule 12(f), Federal Rules of Civil Procedure, along with the Plaintiffs' elementary school plan.

Plaintiffs only objection to the Board's middle school proposal is that the burden of transportation continues to be on the black children. The middle school map (Exhibit 269), and the testimony of Mr. Osborne, demonstrate conclusively that this is not the case. In many instances, white children are required to travel to predominately black communities to attend school. For example, white children in the outer reaches of the County are required to travel to the predominately black innercity to attend Cameron; white students from the southern portion of the Pearl zone are required to travel into the innercity to Pearl; white students are required to travel into Ewing Park; and white students are required to travel into Cumberland. Merely because there may be more non-contiguous zones made up of predominately black children does not mean that these students must travel longer distances or greater lengths of time than white children, nor does it mean that these students must necessarily travel out of their neighborhoods more often than white children. The Court finds that the locations of the middle schools were chosen by a neutral process, in an effort by the Board to accommodate the unique middle school program at the best possible places, thereby looking forward to the enhancement of quality education. The amount of transportation involved for either race is necessary to reach the 15% representation level deemed desirable by the Plaintiffs' expert witness, Dr. Hugh Scott and approved by the Court in its Order of May 20, 1980.

In addition, Plaintiffs' objection regarding burden on black students at the middle school level constitutes not an objection, but an admission that the Plaintiffs' proposed plan does not comply with the Court's Order. Plaintiffs used the same middle schools in their proposed plan that the Board has used under its plan. (Exhibit 283). It is inconceivable that their objections regarding burden on black children can be alleviated by their plan because there are no additional middle schools in the black community. When this obvious concept is coupled with the racial balance approach used by the Plaintiffs, which will re-

quire transportation of greater numbers of black children out of the black community, it is apparent that the burden on black students is increased in the Plaintiffs' plan contrary to the basic concepts of the Court's Order.

The Board's high school plan (Exhibits 267 and 268) is also in total compliance with the Court's directive of May 20, 1980. Bellevue and Joelton were closed as high schools in the school year 1980-1981, with the high school population of these schools being reassigned to Hillwood and Whites Creek pursuant to the Court's directive. The long range proposal for 1984 forecasts the closure of Antioch, DuPont, Pearl, Cohn, and Goodlettsville as high schools, with their school populations being accommodated by the Goodlettsville-Madison, Pearl-Cohn, McGavock, Glencliff and Overton zones ordered by the Court.

The only deviation from the plan contemplated by the Court and the Board's new plan concerns Goodlettsville-Madison. Since the early 1970's, the Board has proposed to build a new Goodlettsville-Madison-Trinity Hills Comprehensive High School at the Hunter's Lane location. Upon reconsideration of this proposal following the Court's Order, the Board determined that it would be more economically responsible to expand the existing Madison High School to accommodate students from the Goodlettsville, Madison, Trinity Hills, and DuPont areas at a savings in excess of $2,000,000.00. (Board Minutes, Exhibit 286). The testimony of Mr. Osborne indicates that the locations make little difference to the student populations involved. If anything, the Madison location is slightly closer to the highest concentration of black students for the school population in the Trinity Hills area than was the Hunter's Lane location and the racial makeup of the school is not affected by a change in location.

The Ford Greene site chosen for the Pearl-Cohn Comprehensive High School is also approved as a central location in the proposed zone, taking into account the relative concentration of students in that zone.

It should be noted here that while the Court did not decree the racial mixture in the high schools as it did in the middle schools, all of the Board's proposed high schools, with the possible exception of Goodlettsville-Madison at 14.9% black, fall well within the 15% either race guideline established by the Court for middle schools. Furthermore, three of the 10 schools are projected to be majority black in 1984.[23]

The Plaintiffs only objections to the high school plan concern the Board's failure to consider the pairing of Maplewood and Goodlettsville in lieu of building the Goodlettsville-Madison Comprehensive High School, and its failure to use Pearl as a high school. (Objection 3(b) (February 6, 1981), and Objection 2(b) (March 25, 1981)). Both of these objections are without merit. The Maplewood objection attacks rather than follows the Court's Order of May 20, 1980, and accordingly, it should not be considered. The soundness of the Board's action in converting Pearl to a middle school is supported by the fact that the Plaintiffs' plan also uses Pearl as a middle school, rather than a high school. (Exhibit 283).

In view of this discussion, the Board's long range pupil assignment plan is approved in its entirety as in compliance with the Court's Order of May 20, 1981.

B. *The Interim Plan.*

The Board's interim plan for implementation in the fall of 1981 proposes to implement the Court's Order of May 20, 1980, in only one area of the county—the area encompassed by the Whites Creek Comprehensive High School zone (Map, Exhibit 272, and statistical summary, Exhibit 272). Insofar as this plan goes, this portion of the interim plan is approved, including the

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[23] Maplewood, Pearl-Cohn, Whites Creek.

minor deviations from the long range plan requiring the phasing in of certain zones over the next three years.[24]

In 1981, implementation of the plan in the northeastern section of the County will involve eight elementary schools serving grades K-4, three middle schools serving grades 5-8, and one comprehensive high school.

At the time this plan was filed, the Court was concerned that more of the County could not benefit from the early implementation of the three-tiered grade structure from intervention/remediation and from the magnet school proposal until 1984. Accordingly, on March 31, 1981, the Court directed the Board to present further alternatives for increased implementation of the plan on April 6, 1981.

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[24] As Mr. Osborne testified, the Whites Creek zone, as shown on the 1984 long range map, can be implemented in 1981, with a few minor exceptions. These exceptions relate to building capacity. Whites Creek can accommodate the Union Hill zone (now in Goodlettsville), the Brick Church zone (now in Maplewood), and the Haynes Manor area (now in Maplewood) in 1984, because of projected declines in enrollment. However, during the interim, only one grade a year from those areas can be added to Whites Creek. Therefore, beginning with the ninth grade in 1981, adding the tenth grade in 1982, and so on, the interim plan proposes to stagger the implementation of the long range plan in this area. The procedure will not only direct itself toward building capacity, it will also facilitate as little disruption of students as possible, since students who begin the ninth grade at Maplewood and Goodlettsville in 1980-1981 will be permitted to graduate from those schools.

The zones for the three middle schools, Joelton, Ewing Park, and Cumberland, will be implemented in 1981, with the exception that children in the Parkwood Estates area will continue to attend Ewing Park until 1984, when they are scheduled to attend Goodlettsville, and students from the Haynes area will continue to attend Meigs and Highland Heights until 1984, when they are scheduled to attend Ewing Park. These deviations are necessary because of capacity problems that will be alleviated in 1984 by virtue of the construction of a new high school to serve the Goodlettsville-Madison-Trinity Hills-DuPont area.

In directing the Board to consider other alternatives for implementation of the plan, the Court was not attacking the Board's good faith efforts in deciding not to implement the plan further. As was stated by Mr. Osborne, the rationale behind the slow implementation was that until the two new comprehensive high schools were built, any rezoning of students could be made on a temporary basis only. To avoid temporary disruption of students on this basis, the Board decided to make such changes only where permanent assignments could be made, and this could only be accomplished in the Whites Creek zone. While understanding this rationale, this Court deems the benefits to be achieved by the earlier implementation of the plan to far outweigh the minor disruptions occasioned by a stepped-up timetable.

After the Court's directive to the Board to develop an alternative proposal, the Board reported to the Court a proposal to implement the new plan insofar as possible in the southeast sector of the city in addition to the northeast sector.[25] This proposal would involve the rezoning of Cohn and Pearl High School students to Hillsboro and Hillwood for the interim period beginning 1981-1982, pending the completion of the Pearl-Cohn Comprehensive High School in 1984. This move would free Pearl and Cohn for immediate use as middle schools, pursuant to the Board's plan, and would also free West End for immediate use as an academic magnet school in 1981-1982. Elementary school zones for this interim plan have not yet been finalized, and some flexibility will be necessary, especially on the outer fringes of the southeast sector. This Court is assured that this planning can be completed well in advance of the approaching school year, and that the appropriate educational components can be in place for this sector just as they will be in place in the northeastern sector. Accordingly, the revised interim plan is approved.

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[25] This proposal was attached to the interim plan map in the form of an overlay on Exhibit 272 and is described on Exhibit 279.

It should be noted here that to complete the plan in the remaining sections of the County will require the construction of the Goodlettsville-Madison Comprehensive High School and a sufficient decline in enrollments at Glencliff, McGavock, and Overton, thus permitting the reassigning of students from Antioch High School and DuPont pursuant to the Court's directive. Accordingly, pending such events, attendance patterns in this section of the County should remain as they are.

ADDITIONAL MATTERS

After many days of testimony in this cause, it has become apparent to this Court that the rigid guidelines placed upon the school system by this Court's Order in 1971 have become obsolete and no longer necessary. The good faith efforts of this Board to achieve desegregation have been amply demonstrated by all the plans submitted to this Court. This Court does not deem it necessary to impose further rigid guidelines upon the Board in terms of minor alterations in zone lines where deemed advisable to achieve better integration or to conform to building capacities. In addition, in view of the new plan now approved, the restriction placed upon building in the outlying areas by the 1971 Order no longer has validity, since the new plan addresses desegregation and quality education on a county-wide basis. Accordingly, the ban on such construction, where deemed necessary by the Board to improve facilities, accommodate students, or enhance integration, should be lifted.

An appropriate Order will enter. This is a final order from which an appeal as of right is provided by Rules 3 and 4, Fed. Rules App.Proc. Because efforts at implementation for the school year 1981-82 are immediately imperative, this Court will not grant a stay of this order pending any appeal.

APPENDIX G

Robert W. Kelley, Individually and representative of the class

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.

Henry C. Maxwell, Jr., Individually and representative of the class

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.

Nos. 2094, 2956.

United States District Court,
M.D. Tennessee,
Nashville Division.

May 20, 1980.

In a school desegregation case, the District Court, Wiseman, J., held that: (1) the desegregation plan proposed by the Board of Education, which recommended more busing to achieve more racial balance, would be rejected, because it placed most of the burden of achieving desegregation on young black children and might lead to a public school system serving only the lower social or economic segments of society, and (2) the Board should consider a plan such including features as neighborhood schools for kindergarten and lower elementary grades, a minimum presence of at least 15 percent of the race in the minority at middle schools, the use of magnet schools, the use of public transportation, and educational components to improve the opportunity of school children for intercultural experiences.

Avon N. Williams, Jr., Richard H. Dinkins, Nashville, Tenn., Plaintiffs Intervenors, Carrol D. Kilgore, William E. Higgins, Nashville, Tenn., for plaintiff.

William R. Willis, Jr., Marion F. Harrison, Nashville, Tenn., for defendants.

MEMORANDUM OPINION

Wiseman, District Judge.

The present posture of this case and this Court's action theeon require a recitation of the tortuous twenty-five-year history of desegregation efforts in Metropolitan Nashville.

I. HISTORY OF NASHVILLE-DAVIDSON COUNTY DESEGREGATION PRIOR TO 1971

On September 23, 1955, plaintiff Robert W. Kelley filed this class action lawsuit to enforce *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), decided the previous year, and to enjoin the defendant Board of Education of the City of Nashville from continuing to operate a segregated school system. A three-judge court was convened in this district,[1] but, upon defendants' concession that the law was unenforceable under *Brown*, the three-judge court was dissolv-

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[1]The three-judge court was convened pursuant to 28 U.S.C. §2281, since plaintiffs contested the constitutionality of Tennessee law mandating segregation, T.C.A. §§49-3704. These statutes, enacted in 1901, prohibited interracial schools and the teaching of interracial classes. Misdemeaner penalties were prescribed for violation of this law. Section 49-3701 provided that "[i]t shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning." Acts 1901, ch. 7, § 1; Shann., § 6888a37; Code 1932, § 11395. Correlatively, section 49-3702 provided as follows:

> It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learing, or allow or permit the same to be done with their knowledge, consent, or procurement.

Acts 1901, ch. 7, §2; Shann., § 6888a38; Code § 11396.

ed for lack of jurisdiction and the case remanded to a single district judge of this Court. *Kelley v. Board of Educ.*, 139 F.Supp. 578 (M.D.Tenn. 1956).

After a hearing on the proposed plan for desegregation submitted by the defendant Board, the Court, on January 21, 1957, approved the plan insofar as it provided for desegregation for grade one in the year 1957-58, but ordered the Board to develop a plan to eliminate segregation in the remaining grades. *Kelley v. Board of Educ.*, 2 Race Rel.L.Rep. 21 (M.D.Tenn. 1957). On February 18, 1958, this Court rejected as unconstitutional the Board's proposed plan, essentially modeled after the Parental Preference Law, T.C.A. §49-3704,[2] passed in January of 1957, and previously held unconstitutional by this Court in *Kelley v. Board of Educ.*, 2 Race Rel.L.Rep. 970 (M.D.Tenn. 1957). The proposed plan proscribed mandatory integration or segregation in any grade but permitted parents to choose between sending their children to a one-race or integrated school. The Court allowed the defendant Board two months to file another plan for desegregation of all grades.[3] *See Kelley (sic) v. Board of Educ.*, 159 F.Supp. 272 (M.D.Tenn. 1958). On June 19, 1958, this Court approved the proposed Board plan that provided for elimination of compulsory segregation in grade two as of the academic year 1958-59 and in one additional grade a year thereafter. *See Kelley v. Board of Educ.*, 3 Race Rel.L.Rep.

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[2] Section 49-3704 read as follows: "Separate schools authorized.—Boards of education of counties, cities and special school districts in this state are authorized to provide separate schools for white and Negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race." Acts 1957, ch. 11, § 1.

[3] At the same time, the Court denied defendants' motion to dismiss tht was grounded on the adequacy of the administrative remedy provided in the Pupil Assignment Act, also enacted in January of 1957. *See* Pub. Acts 1957, cc. 9-13.

651 (M.D.Tenn. 1958), *aff'd*, 270 F.2d 209 (6th Cir.), *cert. denied*, 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240 (1959).[4]

At the time *Kelley v. Board of Education* was filed, Davidson County, surrounding Nashville, and the City of Nashville maintained separate school systems. Because the *Kelley* order had no effect upon the county school system, which continued to operate as a segregated system, plaintiff Henry C. Maxwell, Jr., filed a class action complaint on September 19, 1960, which paralleled the complaint previously filed by plaintiff Kelley against the Board of Education of the City of Nashville. On November 23, 1960, this Court approved a gradual desegregation plan submitted by defendant County Board of Education but modified the proposed one-grade-a-year component to require that immediate desegregation take place in grades one through four with an additional grade each year in the future. By so ordering, the Court placed the county school system on the same grade-a-year basis as the city school system. *See Maxwell v. County Bd. of Educ.*, 203 F.Supp. 768 (M.D.Tenn. 1960), *aff'd*, 301 F.2d 828 (6th Cir. 1962), *aff'd in part , rev'd in part, sub nom. Goss v. County Board of Educ. of Knoxville*, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).[5]

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[4] Plaintiffs appealed from the Court's order because they asserted that *Brown* mandated that desegregation be achieved with more celerity than one grade per year. Defendants, on the other hand, appealed the Court's ruling that the portion of the plan that implemented the Parental Preference Law was unconstitutional.

[5] The plan, as approved by this Court and affirmed by the Court of Appeals, included a minority-to-minority transfer option for students who would otherwise be zoned to schools in which they would be in a racial minority. This provision is the converse of the majority-to-minority transfer policy *currently* in effect in Nashville-Davidson County. The United States Supreme Court granted certiorari to decide the constitutional validity of the minority-to-majority transfer provision of the school plan for Knoxville, Tennessee, as approved by the District Court for the Eastern District of Tennessee, *Goss v. Board of Educ.*, 186 F.Supp. 559 (E.D.Tenn. 1960), and affirmed by the

On September 10, 1963, after the City of Nashville and Davidson County merged into a metropolitan government, the *Kelley* and *Maxwell* cases were consolidated by consent order and the Board of Education for Metropolitan Nashville-Davidson County was submitted as defendant.[6] The case has remained in the same posture since 1963, with the primary defendant being the Metropolitan County Board of Education of Nashville and Davidson County. No significant action was taken by this Court in regard to school desegragation until over six years later.[7]

Upon plaintiffs' motion for injunctive relief, this Court, on November 6, 1969, issued a temporary restraining order, enjoining defendant Board from purchasing new school sites, building new school facilities, or expanding existing school facilities, until a hearing on the motion. After such hearing, the Court, on

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Court of Appeals for the Sixth Circuit, *Goss v. Board of Educ.*, 301 F.2d 164 (6th Cir. 1962), as well as such policy included in the *Maxwell* plan. The Supreme Court reversed, holding that the minority-to-majority provision of both plans was constitutionally defective. *Goss v. Board of Educ.*, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).

[6] The 1963 consent order substituted the Transitional Board of Education for the Metropolitan Government of Nashville and Davidson County as defendant. By order of December 3, 1964, the Metropolitan Board of Education and its board members were substituted for the Transitional Board.

[7] In the interim, the plaintiffs challenged an action taken by the defendant school board and the state secondary athletic association, which had suspended a predominantly black, inner city school from participation in the interscholastic athletic program. The Court ruled that due process had been denied in the procedure used for suspending the school. The Court did not, however, deal with any aspects of the pupil assignment portion of the desegregation plan. *See Kelley v. Board of Educ.*, 293 F.Supp. 485 (M.D.Tenn. 1968).

July 16, 1970,[8] enjoined the Board from construction not commenced as of the date of the restraining order, and ordered that the Board devise a comprehensive plan for a unitary school system that included, *inter alia*, rezoning and school construction to maximize school integration. *Kelley v. Metropolitan County Bd. of Educ.*, 317 F.Supp. 980 (M.D.Tenn. 1970). The defendant submitted a plan as ordered, but, on August 25, 1970, the Court effectively stayed its order until resolution by the United States Supreme Court of school desegregation cases then pending before it.[9] On December 18, 1970, however, the Court of Appeals for the Sixth Circuit vacated the stay and reinstated this Court's order. *Kelley v. Metropolitan County Bd. of Educ.*, 436 F.2d 856 (6th Cir. 1970).

II. THE 1971 COURT ORDER

Pursuant to the remand order of the Court of Appeals, this Court held hearings on the Board's proposed revised plan in the spring of 1971. At such hearings, a plan was submitted by the Board, a plan by the plaintiffs, including alternate plans for the elementary schools, and two alternate plans submitted by the Department of Health, Education, and Welfare [HEW], acting as consultant to the Court. The Court rejected defendants' proposal, calling it a "mere tinkering with attendance zones," and "only a token effort." *Kelley v. Metropolitan County Bd. of Educ.*, Nos. 2094, 2956, at 6 (M.D.Tenn. June 28, 1971).[10]

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[8] The opinion was issued on July 16, although the judgment was not entered until August 13, 1970.

[9] The most significant case involved was *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

[10] Although the opinion was issued by this Court, it is impossible to refrain from commending my predecessor on this case, now Chief Judge L. Clure Morton, for an opinion that was remarkable not only in its portrayal of courage by its author in light of the certain community hostility that ensued but also for its forthrightness and clarity in treating the legal mandates and decreeing specific directives and proscriptions.

The Court similarly rejected both of plaintiffs' proposals because they allowed the school board to determine the actual assignment of pupils and implementation of the plan. In light of the Board's past actions and apparently half-hearted efforts to devise a unitary school system that would encourage integration, the Court was naturally reluctant to delegate to the Board the responsibility for specific implementation. Additionally, the Court rejected the elementary school plans proposed by plaintiffs because they included some schools in the periphery of the county. The Court at that time found that the distances involved and the attendant busing costs were so great that it was not feasible to include the outer reaches of the county in a comprehensive busing plan.[11]

The Court did adopt the element in both plaintiffs' and defendants' plans that instituted an "ideal student racial ratio" in the range of 15 to 35 percent black in each school. After rejecting both plaintiffs' and defendants' plans, the Court viewed the HEW plan, as amended after evidence adduced at the hearings, which incorporated geographic zone changes, clustering, contiguous and noncontiguous pairings, and grade restructuring, as the "only realistic plan remaining." *Id.* at 8. Perhaps most significant in terms of its total impact on the school system, the Court, in an effort to insure a racially unitary school system, ordered that over 13,000 more students be transported in the 1971-72 school year than had been bused in the previous year. *Id.* at 4-5.[12] Under the pupil assignment plan as submitted by HEW and adopted by the Court, no school would have a majority of black students.

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[11] Noting that the "practicality and feasibility of a plan is a material consideration," the Court made it clear that the litmus test for a unitary school system was not necessarily the integration of each school within the system. *Id.* at 8.

[12] Approximately 10,500 more elementary school children were to be bused, and 2,838 more secondary children were to be transported. *Id.* at 4-5.

To discourage future resegregation, the Court made specific orders designed to maximize the potential for an integrated system. Included in the Court's order was a directive for the Board to implement a majority-to-minority transfer policy. The Court also approved the proposed construction of what was later built as the White Creek Comprehensive High School because of its proximity to the proposed inner city expressway loop, located approximately half-way between predominantly black and white residential populations. The Court enjoined the construction of the proposed Goodlettsville Comprehensive High School because it would be located in an all-white community and not in proximity to the line of demarcation between the two populations. The Court similarly denied the Board permission to enlarge Hillsboro High School, located in the white community, into a comprehensive high school, enjoined the use of portable classrooms for any purpose other than integration, and, finally, although exempting the predominantly white schools in the other county from the effect of busing, enjoined the Board from renovating or enlarging by either construction or use of portables any schools that serve less than 15 percent black students after implementation of the plan.

Both parties appealed the 1971 decision of this Court.[13] The defendants appealed on the bases of the Court's asserted failure to comply with Rule 23 of the Federal Rules of Civil Procedure, the invalidity of the Court's requirement of a fixed racial ratio, and the alleged adverse effects on the health and safety of the children resulting from implementation of the plan. Plaintiffs cross-appealed, claiming that their proposed plan should have been approved by the Court because it would have achieved a

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[13] The memorandum opinion was issued on June 28, 1971, whereas the order was issued on July 15, 1971. On July 21, 1971, the Court denied defendants' motion to set aside the memorandum opinion of June 28, on the basis of the Court's alleged failure to comply with Rule 23 of the Federal Rules of Civil Procedure. *See* Appendix B to *Kelley v. Metropolitan County Bd. of Educ.*, 463 F.2d 732, 748-50 (6th Cir. 1972).

greater degree of integration and because the HEW plan, as accepted, placed a disproportionate burden upon black children. The Court of Appeals for the Sixth Circuit affirmed on all grounds, focusing on the discretion lodged with the district court and on the fact that some of the claims raised on appeal had not been adequately raised first in the district court.[14]

III. SUMMARY OF ACTIONS TAKEN BY THE COURT AND THE PARTIES SINCE THE 1971 COURT ORDER

Although little action having a significant impact on the school system was taken by this Court between the 1971 order and 1979, the parties filed myriad motions, reports, and letters, many of which were not acted upon during the eight-year period. A recounting of pleadings and other communicatins filed with the Court during these years will help to put the progress of and the problems with school desegregation in this county into better perspective.

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[14] The Court of Appeals found that this Court had used a flexible racial ratio as a guide and that such a guide had been approved by the Supreme Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). Although the HEW plan was "somewhat less stringent" than the plan proposed by the plaintiffs, the Court of Appeals held that the Court's approval was within judicial discretion and had, following the mandate of *Green v. County School Bd. of Kent County*, 391 U.S. 430, 88 S.Ct. 1698, 20 L.Ed.2d 716 (1968), the promise of effectively dismantling the previously dual system. *Kelley v. Metropolitan County Bd. of Educ.*, 463 F.2d 732, 743, 746 (6th Cir. 1972). In regard to defendants' contentions that the proposed plan would work undue hardships on the children of this county, the Court of Appeals noted that such concerns had not properly been presented to the district court and were, therefore, not cognizable on appeal. Similarly, the Court of Appeals stressed the fact that the district court would be open to motions for modification by plaintiffs if there were adverse effects on black children who were, according to plaintiffs, made to bear the brunt of the busing burden. The HEW plan, as accepted, paralleled the *Swann* plan, and the incorporation of any disparate burden on black children into that plan was not addressed by the *Swann* Court.

The first report by defendants was filed with the Court on October 19, 1971, and described the first month of operation under the plan. Two days later, plaintiffs moved to join as parties defendant the Metropolitan Government, the Metropolitan Mayor, and the members of the Metropolitan Council since they controlles the purse strings from which money for increased transportaion must come.

Defendants' second report to the Court was filed on March 17, 1971, which proposed the attendance zone and other plans for a new comprehensive high school in the Joelton-Whites Creek area, which would be close to the proposed inner loop in the northeastern part of the county and which the Court in the 1971 order had indicated it would approve when plans were finalized. Additionally, the report proposed capital improvements for schools whose student composition was at least 15 percent black. No action was ever taken on the proposals included in this report.

Three months later, the defendant Board of Education filed a petition, seeking changes in the plan in regard to elementary and junior high school zones and the approval of the use of an annex for an overcrowded school in the southeastern portion of the county unaffected by the Court's busing order. Plaintiffs responded by generally objecting to the proposed changes and requesting changes in the plan as adopted, in that it called for the closure of certain inner city black schools and clustering patterns that required more cross-busing of black children than whites.

A hearing was held pursuant to the motions filed and, by order and memorandum, issued August 17, 1972, and August 19, 1972, respectively, the Court granted plaintiffs' motion to add the additional parties defendant, approved the requested changes in the elementary school zone, but denied the defendants' proposed changes in three junior high schools that would have resulted in lessened degrees of desegregation in those

schools. The Court also ordered that the Board purchase additional buses, report to the Court regarding costs of transportation, and close all schools not later than 4 p.m. each day. Further, the Court issued a temporary restraining order against the newly added defendants (council members and mayor) from interfering with the Court's order to desegregate. No action was taken by this Court on plaintiffs' concerns about the alleged disparate transportation burden on black children.

With the third district judge sitting on this case since its inception,[15] the Court held a hearing on the Board's report submitted pursuant to the Court's last order and, by order of August 31, 1972, approved that report and dissolved the injuction against the newly added defendants. Shortly thereafter, the defendant Board sought modification of the August 17, 1972, order prohibiting school closure not later than 4 p.m., which this Court granted on September 11, 1972.

The final action taken by this Court prior to pretrial matters and the subsequent hearings in the summer of 1979 involved an action brought by three newly added black City Council defendants as third party plaintiffs against the United States, HEW, and federal officials, as third party defendants. The third party plaintiffs sought to enjoin the third party defendants from continuing to withhold federal funds that would be used for transportation expenses which would be incurred in implemen-

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[15] When this case was first instituted and after the three-judge court was dissolved, *see* text accompanying note 1 *suprs*, it was assigned to Judge William E. Miller. He continued to hear the case throughout the next fourteen years and, when he was elevated to judge of the Court of Appeals for the Sixth Circuit, he issued a memorandum and order of 1970 as district judge sitting by designation. After that order, however, the case was reassigned to Judge L. Clure Morton, who retained the case until he recused himself after the defendant Mayor moved for recusal on August 22, 1972. The case was then assigned to Judge Frank Gray, Jr. When I took the bench in August of 1978, the case was then reassigned to me, making the fourth district judge sitting on this case.

ting the Court's desegregation order. After holding that the Court had jurisdiction over the third-party defendants except for the United States, *see Kelley v. Metropolitan County Bd. of Educ.*, 372 F.Supp. 528 (M.D.Tenn. 1973),[16] the Court held that the acts of the third party defendants in refusing to release funds for busing for desegregation purposes pursuant to a recently promulgated policy was illegal. The Court further enjoined the third party defendants from enforcing such an illegal and uncontitutional transportation policy and to act within their discretion upon requests for funds. *See Kelley v. Metropolitan County Bd. of Educ.*, 372 F.Supp. 540 (M.D.Tenn. 1973).

Several matters were pending before this Court at the time it addressed the third party issues. They were not dealt with by the Court at that time nor has this Court taken any action on them since that time. As discussed *supra*, no action was ever taken in regard to the report filed by the defendant Board on March 17, 1972, in which the Board sought approval for construction of White Creek Comprehensive High School. Since that time, the White Creek School has been constructed. The current zones for the school are incorporated into a petition filed by the Board on July 24, 1978, discussed *infra*.

Also pending at the time of this Court's last order was the Petition for Approval of the Long Range Building Program, filed on May 30, 1973.[17] This proposal outlining twenty-six

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[16] On December 13, 1973, the Court also granted the original defendant Board of Education leave to intervene as a third party plaintiff in this third party action.

[17] Over a year later, on December 27, 1976, plaintiffs responded to this petition by generally denying all allegations.

building projects has essentially merged into more recent pleadings that describe future plans in greater detail.[18]

The day after the Petition for Approval of the Long Range Plan was filed, defendant Board filed a petition for approval of portables for use in kindergartens. *See* Exhibit 55. At the time of the 1971 court order, this county had not extensively instituted the systemwide, nonmandatory kindergarten program presently in existence. As discussed above, the 1971 order had specifically prohibited the use of portables for any purpose other than to achieve integration. The Court left the Board's request for portables unanswered, and the Board utilized portables at kindergarten locations beginning in the school year 1973-74.

Over two years elapsed before either party officially filed further pleadings in this case, although counsel for the Board corresponded by letter to the Court during this period of time.[19]

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[18] On the same date that the Petition for Approval of the Long Range Building Program was filed, the Board also filed a motion to produce documents. This motion has little current significance. Discovery matters raised by the parties in this case were disposed of prior to and, in some instances, during the pendency of the recent hearings.

[19] Counsel for the Board filed two letters unreported on the Court's docket sheet. The first was filed on August 15, 1973, and relayed the Board's decision to proceed with the plan for using portables at kindergarten sites. *See* Exhibit 55. On October 19, 1973, counsel filed a letter requesting a speedy resolution of the Petition for Approval of the Long Range Building Plan incorporated into the petition filed on May 30, 1973. *See* defendants' memorandum for status conference, filed March 29, 1979. In addition to a relatively insignificant letter filed on November 28, 1973, counsel also filed letters on July 15, 1974, *see* Exhibits 27, 39, and March 14, 1975, *see* Exhibit 37. The 1974 letter informed the Court of the Board's plan to seek funding for high schools that would, beginning in 1978-79, offer comprehensive programs. Included in this plan were the Whites Creek High School and the proposed Goodlettsville-Madison High School. Also listed in the letter were elementary schools that were part of the longrange building plan. In the 1975 letter, counsel related the projected enrollment percentages for Hillwood, Hillsboro, and Stratford, as expanded comprehensive high schools, and informed the Court that funding for vocational facilities at these schools would be sought.

The next official pleading was defendants' motion to amend their previously filed Petition for Approval of the Long Range Building Plan and for further relief, filed October 14, 1976, wherein the defendants specifically described new plans for the proposed Goodlettsville-Madison High School and asked the Court's approval to implement these plans.

The first pleadings filed by plaintiffs since 1972 were the answer to defendants' proposed long range plan and a Petition for Contempt and for Further Relief, both filed on December 27, 1976. Plaintiffs therein moved that defendants be held in contempt for their plan to construct the Goodlettsville-Madison High School,[20] the expansion of Hillsboro, Overton, Hiliwood, Glencliff, Stratford, and Maplewood High Schols into comprehensive high schools,[21] the construction of Whites Creek Comprehensive High School,[22] the establishmentof the Cole

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[20] Defendants had described this plan in their motion to amend, filed October 14, 1976, discussed *supra*. The 1971 Court order had specifically enjoined the construction of the Goodlettsville-Madison High School, as proposed at the time since, because of its location in the white suburbs and away from the imaginary inner loop divider, it would tend to promote segregation. Since the 1971 order, however, the defendant Board had changed the proposed site location for the school from the city limits of the surburban City of Goodlettsville to a location nearer to the inner loop extended.

[21] Requests for expansion of Hillsboro High School, implicitly disapproved by the Court in the 1974 order when it denied defendants' application to acquire additional property for expansion to a comprehensive high school, had been reiterated in defendant' Petition for Approval of the Long Range Plan of May 30, 1973, and in counsel's letters of July 15, 1974, and March 14, 1975. Also included in these communications were explanations of expansion of other comprehensive high schools, listed above.

[22] Such construction had been proposed in defendants' petitions to the Court, filed March 17, 1972, and May 30, 1973, and again in counsel's letter to the Court of July 15, 1974.

Elementary School Annex,[23] and, finally, the proposed closure of Pearl High School, the only traditionally black high school located in the inner city.[24]

Plaintiffs also sought alterations in the Court's 1971 order, stressing, as they had before and after the 1971 order, the disparate busing burden placed of black children.[25] According to the plan and the Board's implementation of it in the last nine years, black children are bused out of the inner city to schools in predominantly white neighborhoods for grades one through four, whereas white children are bused into the inner city to attend formerly predominantly black schools in grades four and five.

Plaintiffs further requested that the 1971 order be modified to include a requirement that defendants recruit, employ, and assign black personnel commensurate with the ratio of the black students in the school system. Finally, plaintiffs asked the Court to change the 1971 order to incorporate a plan to upgrade Pearl High School and other inner city schools.

In plaintiffs' petition for contempt and further relief, they additionally asked the Court to award attorneys' fees. They had

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[23] As reported to the Court on July 15, 1976, the Board reopened Turner School to serve as an annex for the fifth and sixth grades at Cole for the year 1976-77. Cole is located in the southeastern part of the county, outside the "court-ordered" area, whereas Turner is located further in toward the center of the city in the "court-ordered" area.

[24] By the time this case was heard in July of 1979, the Board had rejected the plan, as submitted by the staff, to close Pearl.

[25] In addition to raising this issue on appeal, plaintiffs addresses this concern in their response of August 14, 1972, to the Board's petition of July 7, 1972. The Court did not deal with this issue in its order and memorandum opinion, issued August 17, 1972, and August 19, 1972, respectively.

previously requested attorneys' fees in motions dated February 8, 1974, and April 11, 1975, as well as in a motion, filed October 16, 1975, to dispose of the pending motions for attorneys' fees.

The next formal pleading was filed in this Court by defendant Board nearly two years later. In its Petition for Approval of School Attendance Zones for 1978-79, filed on July 24, 1978, and amended on August 18, 1978, the Board asked that the Court accept new zoning plans, grade structures, and feeder patterns.[26] Plaintiffs responded to defendants' request, but no action was taken by this Court.

The final pleading filed in this case prior to the 1979 pretrial matters was plaintiffs' amendment to the October 14, 1976, Petition for Contempt and for Further Relief, filed on August 28, 1978. Basically, the amended petition reiterates the concerns stated in plaintiffs' earlier petition although in addition it responded to defendants' July 24, 1978, petition.

IV. THE 1979 COURT ORDER

In the spring of 1979, this Court held a pretrial conference to distill the remaining issues, some of which had obviously laid dormant for years, and to organize the progression of the case. In an effort to simplify the future presentation of the case, the Court divided the pending matters into four phases, which would be heard seriatim: (1) Historical recapotulation of school

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[26] The petition detailed the zone lines for Hillwood, Hillsboro, Overton, Maplewood, Glencliff, Stratford, and Whites Creek as comprehensive high schools serving grades nine through twelve, the addition of grade nine to McGavock, the county's first comprehensive high school constructed under the mandate of the 1973 Vocational Education Act, T.C.A. §§49-2709 *et seq.*, and the addition of grade nine to Cohn High School, the only naturally integrated inner city school, and to Pearl High School, the only remaining traditionally black inner city high school. Additionally, changes were reported for junior high and elementary schools, primarily affecting feeder patterns, decreasing overcrowding, and eliminating one grade schools.

desegregation in this county since 1971, and consideration of the Board's Long Range Plan, including requests for construction projects; (2) Matters relating to the racial composition of staff and faculty; (3) Plaintiffs' petitions for contempt; and (4) Plaintiffs' petitions for attorneys' fees.

Hearings on Phase I were held in June and July of 1979 at the conclusion of which the Court ordered that the defendant Board devise and submit to the Court a new plan for desegregation that would involve the entire metropolitan county rather than exempt the outer reaches as the 1971 order had done. *Kelley v. Metropolitan County Bd. of Educ.*, 479 F.Supp. 120 (M.D.Tenn. 1979).[27] Because of the short time involved before the beginning of the school year 1979-80, however, the Court approved the zones already in effect for 1979-80, and allowed the Board an additional year before implementation of the countywide plan.

Because the Vocational Education Act, T.C.A. §§49-2709 *et seq.*, mandated that each school system provide children with an opportunity to attend a comprehensive high school, those children zoned to a noncomprehensive high school in this county had been allowed to transfer automatically to a comprehensive high school. At the 1979 hearings, it became apparent that

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[27] The Court encouraged creativity and innovation in the development of a new plan by stressing that the Board should "assum[e] no parameters heretofore ordered by the Court." *Id.* at 122. The Court instructed the Board, in developing the plan, to consider the maximum utilization of existing buildings, especially those in the inner city, the economic factors of transportation costs and fuel economy, the time and distance involved in transportation, and any other factors that would "impact upon the ultimate objective of a quality educational opportunity for all children in Davidson County through a unitary school system." *Id.* In so instructing, the Court attempted to stress that the goal of the school system and the Court, in its intervention into the operation of the system, should be to insure the opportunity for quality education and that any desegregation remedy should be viewed as a means toward that end rather than an end in itself.

white children zoned to Pearl High School in the inner city had used this oppotunity to defeat the desegregation efforts at that school, leaving Pearl 96.6 percent black in the school year 1978-79. The Court, therefore, enjoined the Board from further implementation of the automatic transfer policy, ordered it to review all transfer requests, and grant such transfers only for bona fide program reasons. Such an injuction was issued orally from the bench on July 2, 1979, before the conclusions of the hearings.

On August 7, 1979, subsequent to the issuance of that injuction and the already concluded hearings, plaintiffs filed a petition for contempt, charging that the Board had not complied with the July 2 order. Hearings were held during August of 1979 on plaintiffs' motion for contempt. The Court found that the procedure used by the Board in approving subject-matter transfers had "a negative impact upon the desegregation efforts of the School Board" and violated the spirit of the Court's 1971 order as well as the July 2, 1979, order. 479 F.Supp. at 129. The Court, therefore, specifically defined the procedure by which requests for subject-matter transfers should be considered. *Id.* at 124-30. Pursuant to defendants' motion filed after the hearings, the Court permitted the Board to grant any transfer requests of any senior who asked to transfer from a school to which he was zoned to the high school he attended as a junior in the previous year. *Id.* at 131-32.

V. DEVELOPMENTS SINCE THE AUGUST 1979 COURT ORDER[28]

In response to the August 27, 1979, Court order, the defendant Board began meeting on October 29, 1979, to develop a countywide desegregation plan. In compliance with the Court's

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[28] Due to the length and complexity of this memorandum opinion, the findings of fact and conclusions of law have not been stated separately, but this entire memorandum opinion shall constitute findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

suggestion that the Board encourage and consider community input,[29] the Board established a citizens' advisory panel whose members sat with the Board in its deliberations on the plan. Each of the nine Board members, three of whom were black, chose one citizen representative.[30] Five public hearings were held in November of 1979, at which time suggestions from citizens were sought in an effort to develop criteria upon which to base a plan. After the public hearings, the Board and

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[29] The Court noted that the significance of an difficulties in achieving a unitary school system mandate that "the best minds availablle to the parties, including inputfrom the many well-motivated, thoughtful citizens of the community, should be sought and received." *Kelley v. Metropolitan County Bd. of Educ.*, 479 F.Supp. 120, 123 (M.D.Tenn. 1979).

[30] In addition, a white interim Board member previously apointed to fill a vacancy continued to sit with the Board as a citizen representative, although his permanent replacement had already been designated and actively participated in the deliberations.

Citizens' Advisory Panel met five times in December of 1979, to develop criteria for the plan.[31]

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[31] The Board adopted the following twelve criteria that should be utilized in the development of the plan:

1. That all schools in the county would be involved in the unitary school plan;

2. That a four-tiered system of grades be adopted, which would consist of 1-4, 5-6, 7-8, and 9-12 as nearly as possible;

3. That a child would not go to more than four schools during his experience, if his residence did not change;

4. That feeder patterns of elementary to middle to high school be established which would allow as many students as possible to remain together for as long as possible;

5. That the goal of this plan be that each school have an optimum of 32 percent black students with a 20 percent range on either side of optimum (12 percent black to 52 percent black);

6. That the goal of the plan be the establishment of a magnet program in any secondary school in which the white minority enrollment is between 10 percent and 20 percent;

7. That, wherever possible, school zones that are integrated by at least 32 percent minority (black or white) without busing for racial balance should be established;

8. That the goal of the plan be to distribute the burden of busing as equitably as possible;

9. That the planners be directed to consider all existing buildings, full utilization of presently used buildings based on projected enrollment, the option of reopening buildings not now in use, expansion of these buildings, and the possible addition of new buildings which will facilitate the other major criteria of the plan;

10. That priority consideration be given to the utilization of existing facilities prior to recommendations for construction of new buildings;

11. That the average bus ride, one way, be kept to 30 minutes and no route will be longer than 80 minutes (the longest route at the present time under the present plan);

12. That no first and second grade students be required to ride buses more than 30 minutes one way unless it is to the nearest school. *See* Collective Exhibit 154, at 479-80, 483-84, 529, 568.

During these December meetings, the Board voted to retain three outside consultants who had expertise in the area of school desegregation.[32] A planning team was formed, composed of the three consultants, the Assistant Superintendent for Facilities and Services, the Director of Zoning for the school system, eight principals currently employed by the school system, and two administrative employees of the Board's central office.[33] Input was also received from other experts in the field who had either worked with school systems under desegregation orders or who had academic expertise in this area.[34]

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[32] The three outside consultants hired by the Board were Dr. Donald Waldrip, former Superintendent of the Cincinnati Public School System, former Assistant Superintendent of the Dallas School System, private consultant to various school districts on their desegregation plans, and an authority on magnet schools; Dr. Everett Myer, Assistant Director, Educational Opportunities Planning Center, University of Tennessee, Knoxville, Tennessee; and Mr. Nathaniel Crippens, retired Associate Director of the Desegregation Assistance Center, University of Tennessee College of Education, Knoxville, tennessee.

[33] The principals represented elementary, junior high, and high schools, including schools formerly unaffected by the Court order as well as those within the 1971 order. Of the eight principals selected, three were black. Of the two administrative personnel, one was black and one white.

[34] The five experts consulted by the Board and planning team were Dr. Jay Robinson, Superintendent of the Charlotte-Mecklenburg, North Carolina School System; Dr. Robert Crane, Sociologist and Professor at Johns Hopkins University; Dr. James Barnes of the Northeaster Desegregation Center, Hartford, Connecticut; Dr. Vern Cunningham, court-appointed Master of the Columbus, Ohio School System; and Dr. Richard Pride, Associate Professor of Political Science, Vanderbilt University, Nashville, Tennessee, and author of a study on the phenomenon of "white flight" in Louisville, Memphis, and Nashville.

The planning team worked through February 4, 1980, consulting regularly with the Board. The Board met to develop a plan, using the previously established criteria, thirteen times during January and February of 1980, spending over 65 hours on its formulation. Two of these meetings were devoted to public hearings to obtain further community imput. *See* Exhibit 177. In the early morning hours of February 5, 1980, the Board adopted a plan, after spending close to one hundred hours of preparation and deliberation. *See* Exhibit 178.

The plan, thus developed and approved, was submitted to the Court on February 11, 1980. In its regular February 12, 1980, meeting, however, the Board voted to amend the plan. Such amendment was filed with the court on February 14, 1980, by way of affidavit of counsel for defendant Board. Plaintiffs filed their objections to the Board's proposed plan on February 29, 1980. A diverse group of plaintiff-intervenors,[35] representing schools slated for closure under the Board plan, requested and were granted permission to intervene and filed the

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[35] The intervenors represented parents and concerned citizens from the following areas:

(1) the Bellevue community, which is a growing, predominantly white area in the southwest portion of the county in which the Board proposes to close Bellevue High School, leaving only a junior high;

(2) the Joelton community, which is a rural, predominantly white area in the northwestern part of the county where the Board proposes to close Joelton High School, leaving it operational as an elementary and junior high;

(3) the inner city, intergrated neighborhood surrounding Cohn High School; and

(4) the almost totally black neighborhood adjacent to the inner city Pearl High School.

The Court cannot help but be pleasantly surprised as well as exceedingly gratified that citizens from these communities with diverse concerns and needs have bound together in a spirit of cooperation and industry. It is to be hoped that these citizens will continue to work together in the coming years to insure the effectiveness of a unitary school system in this county.

rudiments of an alternative plan on February 29, 1980. The intervenors' plan was modified and refined during the course of the hearings and submitted with greater detail in their proposed plan on April 14, 1980.

Hearings in this case recommenced on March 3, 1980, and were held for sixteen days in March, nine days in April, and ended with closing arguments on May 1, 1980. During these hearings, testimony was received regarding the plans submitted by both the defendant Board and the intervenors. Before the hearings started, while they were in progress, and even thereafter, the Court received several hundred letters from parents, interested citizens, and community groups, all of which were made a part of the official record in this case. A comparable number of letters was received by the defendant Board. The compendium of such letters to the Board was introduced into the record as Collective Exhibit 170. Amicus curiae briefs were filed by the Metropolitan Nashville Education Association, the League of Women Voters, and the American Education Legal Defense Fund. The three black members of the Board filed a dissent to the plan proposed by the Board and also testified at the hearings. Another white Board member also filed a separate, written dissent from the plan.

During the course of the hearings, the plaintiffs were offered the opportunity to file an alternative plan. This offer was first declined but later accepted by the plaintiffs. The additional time requested in which to develop such a plan, however, appeared to preclude a resolution of the case by the beginning of the school year 1980-81 and, therefore, no such plan was presented. The plaintiffs did, through their expert witness, Dr. Hugh Scott,[16] offer specific objections, recommendations, and suggestions to the Court.

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[16] Dr. Scott is presently Dean for Programs in Education and Professor of Education at Hunter College of the City University of New York. He has been a professor of education at Howard University, Superintendent of Schools for the Public Schools of the District of Columbia, Region Assistant Superintendent for the Detroit Public Schools, and has published numerous articles relating to education.

During the pendency of the hearings and thereafter, the Court read all communications from the public and studied in detail the plans proposed by the defendant Board and the intervenors, the objections filed by the plaintiffs, and the concerns and suggestions presented in the amicus briefs. The plans and objections thereto will be described below.

VI. PROPOSED DESEGREGATION PLAN SUBMITTED BY DEFENDANT SCHOOL BOARD

Several basic principles, developed initially by the Board as criteria to be used in formulating the plan, *see* note 31 *supra*, are woven into the plan as finally adopted and submitted to the Court although rigid adherence to these goals was apparently not always possible. The Board determined that a four-tiered grade structure was the most conducive to integration efforts and that such grade structures would, when feasible, consist of grades 1-4, 5-6, 7-8, and 9-12. The Board adjusted the previous range of percentage of black students per school from 15-35 percent, as adopted by the Court in 1971, to an optimum of 32 percent black with a range of 20 percent in either direction, thus allowing a given school to have only 12 percent black or as much as 52 percent black. The Board focused on the concern of lengthy bus rides by setting a limit of 80 minutes for the longest one-way bus ride[37] and 30 minutes for first and second graders unless a longer ride is necessary to reach the nearest school.

A. Senior High School Plan

The Board plan provides for the retention of the eight existing comprehensive high schools to serve grades 9-12, and the immediate closure of only two of the nine traditional high schools. Joelton High School, in the northwest portion of the county previously unaffected by the Court order, and Bellevue High

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[37] Some white children are presently bused 80 minutes for nonintegration purposes to attend the nearest school.

School, in the southwestern corner of the county, also outside of the Court order, are slated to be closed as high schools but retained as junior highs. The Board proposes to maintain Hume Fogg High School, located in downtown Nashville, as an open-zoned, vocational-educational school for grades 10-12. West End Junior High School would be converted into an open-zoned, magnet school for the academically gifted and would serve grades 7-8 the first year, with one grade per year being added thereafter. In addition to Hume Fogg, only two schools will be limited to grades 10-12. The Board recommends a gradual phasing out of Pearl High School, discussed *infra*. Because of the building capacity of DuPont High School, it is not possible to accommodate ninth graders there using the present zone. With these exceptions, all other comprehensive and traditional high schools would serve grades 9-12.

The Board proposed two alternative plans regarding the two existing inner city high schools. The primary plan calls for the construction of a new inner city, comprehensive high school in a contiguous zone around the present Cohn and Pearl High Schools but somewhat smaller than the existing zones for the two schools.[38] In the meantime, the Board suggests that those students who have been attending Pearl, Cohn, and Hillwood, a comprehensive high school located in a white neighborhood southwest of the inner city to which students from the inner city have been bused, remain at those schools. Those children who, under the old plan, would have entered either Pearl or Cohn beginning in the ninth grade would be zoned to Cohn, resulting in a gradual phasing out of Pearl. Since no students outside of the inner city would be zoned to Pearl during the three year phasing out period, it would be overwhelmingly black. In fact, the Board projects that Pearl's student population would be 92

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[38] Although the Board has not chosen a specific site for Pearl-Cohn, the staff has studied the possibility of using the site of the present Cockrill Elementary School, located close to the current Cohn building.

percent black in the year 1980-81. Cohn, on the other hand, would be within the 12-52 percent range approved by the Board. In contrast, Antioch, located in the southeastern part of the county in a predominantly white neighborhood and slated to receive some students formerly zoned to Pearl, would have a projected black attendance of only 5 percent. Once Pearl is phased out, however, black students in the noncontiguous, former Pearl zone would be zoned to Antioch, raising the percentage to 18 beginning in the 1983-84 school year.

The Board outlined an alternative plan encompassing the inner city high schools in the event the Court did not accept the above-described plan. This alternative plan entailed the closure of both Pearl and Cohn as regular high schools and the rezoning of students now zoned to Pearl and Cohn (except for those students in the present Pearl zone who would attend Antioch) to Hillwood and Hillsboro, both comprehensive high schools located in predominantly white neighborhoods.

The second and final proposal for high school construction involves a new Goodlettsville-Madison-Trinity Hills Comprehensive High School, the plan for which the Board has essentially been seeking approval from the Court since 1972. The present Goodlettsville and Madison High Schools would be closed but retained as junior high schools. Students from northwest Nashville living southwest of Maplewood High School would be bused to the Goodlettsville-Madison High School, giving it a racial ratio within the approved range. Additionally, Stratford Comprehensive High School, whose zone would be contiguous to the zone for the proposed new school, would be within the approved range without pairing with a noncontiguous neighborhood. In contrast, Maplewood and Whites Creek Comprehensive High Schools, also contiguous to the proposed zone for Goodlettsville-Madison, would have a racial ratio of 54 and 58 percent black, respectively, both slightly above the approved range.

The original Board plan contemplated the closure of East High School, located in what is called East Nashville north of the Cumberland River. The Board on February 12, 1980, however, amended the plan to study the feasibility of leaving East open beyond 1983 and revising the previously adopted zone for the new Goodlettsville-Madison Comprehensive High School. It is projected that East would have s student population consisting of 55 percent black students, a ratio slightly over the approved range. With the exception of East, Maplewood, Whites Creek High Schools, and Antioch for the interim period, all other comprehensive and traditional high schools in the county would have racial ratios within the approved range.

During the period of construction of the new Goodlettsville-Madison High School, the Board suggested that inner city students be bused to both Goodlettsville and Madison, giving each of these schools a 12 percent black population. In the event that the Court disapproved of the construction of the Goodlettsville-Madison High School, the Board adopted an alternative plan that would convert Goodlettsville High School to a junior high school, serving grades 7-9 from the present Goodlettsville and Maplewood zones and altering the Maplewood grade structure from its present 9-12 tier to a 10-12 school. Under this plan, both Maplewood and Goodlettsville would have racial ratios within the approved range. The same noncontiguous zone as established for the primary interim plan would be assigned to Madison, making it 12 percent black.

B. Junior High School Plan

With the exception of DuPont Junior High School, the Board proposed that all junior high schools house grades seven and eight. Because DuPont Senior High cannot accommodate grades 9-12, the Board suggested that DuPont Junior High serve grades 7-9, including the middle portion of the area otherwise zoned to Donelson that consists of children who would be bused to DuPont for ninth grade.

As previously discussed, Bellevue and Joelton Senior High Schools would be retained only as junior highs. The Board plan included five noncontiguous zones from which children living in the inner city and in northwest Nashville would be bused to integrate Bellevue, Donelson, Apollo, Goodlettsville, and Neely's Bend Junior High Schools, all of which are suburban, predominantly white schools. In addition, the predominantly white suburban children in the Antioch zone in the southeastern portion of the county would be zoned to Cameron Junior High School, located in the inner city. By expanding and annexing the nearby Johnson Elementary School, previously closed by the Board, Cameron would become one of two middle schools serving grades 5-8. The fifth and sixth graders would be bused into the Cameron Complex from the same zone as the seventh and eight graders. The second middle school serving grades 5-8 would be the Donelson Complex, located in the eastern part of the county. It would be comprised of the present Donelson Junior High School and the nearby Donelson Elementary School and would receive the same children from the northeastern part of the inner city in all four grades.

C. Elementary Schools

As discussed above, the Board developed a two-tiered elementary structure of schools housing grades 1-4 and 5-6. Thre are, however, many variations in this formula in the final plan due primarily to transportation distances and degrees of natural neighborhood integration surrounding exisiting elementary schools. Three schools in East Nashville north of the Cumberland River are scheduled to serve grades 1-6 from the integrated neighborhoods surrounding them.[39]

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[39] These three schools are Cotton, Howe, and Ross, contiguous to each other and located in the East and Stratford High School zones. It is extremely disheartening that only three schools in the county can boast of integrated neighborhoods from which the children can attend true neighborhood schools in an integrated setting without the necessity of noncontiguous busing or clustering of schools.

In addition, a fourth school would be retained as a 1-6 school. The Board's criterion that no student should be bused for more than 80 minutes except to the nearest school precluded the Board from attempting to integrate Harpeth Valley Elementary School, located in the suburban, predominantly white southwestern portion of the county. The Board had initially assigned these 42 children to an inner city school but later altered that assignment due to the travel distance involved. Harpeth Valley would thus remain overwhelmingly white.

Similarly, the Board's criterion precluding busing for first and second graders for more than 30 minutes except to the nearest school affected inner city children who normally would have been bused to one of three 1-4 centers in the eastern part of the county. The Board, therefore, proposed to give these children a choice between attending Buena Vista, located on the edge of a zone contiguous to theirs, or one of the three schools to the east. They would then attend Jackson, Hermitage, or Dodson elementary School in the Donelson cluster for grades three and four and the Donelson Complex for middle school in grades five through eight.

The thirty minute limit on busing for young children also motivated the Board to reconsider the pairing of those children in East Nashville, just north of the Cumberland River, with the three elementary schools in the Neely's Bend area to the northeast. These inner city children near Caldwell Elementary School would have to travel more than thirty minutes to attend the Neely's Bend area schools and vice versa. The Board, therefore, devised a meeting place for these children at Baxter School, located to the northeast of the inner city. Travel distances for the inner city and the more suburban children would be comparable. After attending Baxter, the inner city children would then be bused to one of three 3-6 centers in the Neely's Bend area. The Neely's Bend children would be bused to Baxter for grades one and two but would return to their neighborhood schools for grades 3-6.

The Board developed eleven clusters in which the children would not have to be bused to schools in noncontiguous zones. By drawing zoning lines to take into account the racial makeup of populations within the clusters and pairing schools within the clusters, the Board provided these children the opportunity to stay within their cluster for their entire elementary educational experience. Two clusters out of the eleven, however, are unique. The fifth and sixth graders from the northernmost portion of the Crieve Hall cluster, a somewhat triangular zone in the south central part of the county, are zoned to Binkley Schools, a 5-6 center in the contiguous cluster to the southeast, rather than to Crieve Hall, located in their cluster slightly to the southwest of Binkley.

Several clusters form irregular triangles emanating from the center of the county with broadening bases at the county lines. For the most part, the schools toward the inner city are 5-6 centers and the more suburban schools are designated as 1-4 centers. This pattern is reflected in five of the seven clusters forming irregular triangles. In three of the elementary clusters the schools are located or zone lines drawn so that the pattern described above is inapplicable.

Because of the lack of neighborhood integration, the Board determined that six clusters had to be paired with six other noncontiguous clusters and thus busing across other zones would be necessary. Inner city children surrounding Cameron Junior High in an irregular triangular zone cut out from the Napier cluster would be paired with an irregular circular zone in the far southeastern part of the county. These inner city children would be bused out to the suburban schools for grades 1-4, whereas the suburban children would be bused in to Cameron for grades 5-8. Similarly, inner city children in the north Nashville Wharton zone would be bused to suburban schools in the southwestern part of the county for grades 1-4, and the suburban children would be bused to Wharton for fifth and sixth grades.

The same pattern applied in the zone for children in northeast Nashville around Haynes School who would be zoned to one of three 1-4 centers in the northeastern part of the county, and the fifth and sixth grade children in the Amqui zones who would, in turn, be bused into the city to Haynes. Again, the pattern repeated itself for those children in the zone north of but contiguous to the Haynes zone. They would be bused north to UnionnHill or Goodlettsville for grades 1-4, and the suburban children bused in to Brick Church for fifth and sixth grades. Predictably, the children in grades 1-4 in the inner city zone around Buena Vista would be zoned to either McGavock or Hickman to the east and the more suburban children bused in to Buena Vista for grades five and six. The two pairings of the noncontiguous zones in the suburban Neely's Bend area with inner city Caldwell, and the inner city North Nashville zone with the Donelson zone have already been discussed.

Only one pairing deviated from the pattern of busing inner city children to more suburban schools in grades 1-4 and suburban children into the city for grades five and six. In the zone north of the Cumberland River containing Shwab, Joy, and GraMar, children would remain in that cluster, attending Joy for grades one and two and either Gra-Mar or Shwab for grades 3-6, whereas the children in the zone slightly to the northeast attend Bellshire for grades 3-6 but are bused in toward the city to attend Joy for grades one and two.

Although the Board has adopted a plan to convert West End Junior High to a junior and senior high magnet, with the alternative plan for Pearl to be converted into a magnet, the Board has not chosen which, if any, elementary schools would become magnets. The planners, however, have recommended that five elementary schools be made magnets, feeding into the secondary magnet. This recommendation includes Stateland, located in the Donelson cluster in the eastern part of the county and formerly used as an annex for Dodson School; Dan Mills, located in the Inglewood cluster to the northeast of the inner

city; Burton, located in the Stokes cluster in the southern suburban area of the county; Parmer, also in the Stokes cluster toward the southwestern part of the county; and Ford Greene, in the inner city in the Head cluster.

Under the Board's plan, nine elementary schools would be closed for all purposes. Three of these schools are in the inner city whereas the other five are located in mroe suburban areas to the southwest and southeast of the inner city.

The Board projected that in 1980, under its proposed plan, 87 percent of all elementary school students would attend schools within the approved racial ratio range of 12 to 52 percent black. With the exception of DuPont and Harpeth Valley Elementary, all of the twelve elementary schools whose racial ratios fall outside the approved range are located north of the Cumberland River. In these ten schools, the percentage of blacks is projected to exceed 52 percent. This deviation can be explained by the fact that the black population is most concentrated north of the river where blacks make up 40 percent of the population whereas throughout the county blacks comprise only 32 percent. The largest percentage of blacks attending elementary schools would, however, only be 63 percent, which is projected for three elementary schools.

VII. PLAINTIFFS' OBJECTIONS TO THE BOARD PLAN

As noted above, plaintiffs did not propose a plan as such. However, very specific objections were made and specific recommendations were offered through plaintiffs' pleadings and witnesses.

A. Disparate Burden

Plaintiffs' major complaint to the 1971 plan and to that of the Board now under consideration is the disparate burden each places upon young black children. Both plans are premised upon the "busing out" of black children in grades 1-4, and the

"busing in" of white children in grades 5-6. Plaintiffs insist that such a premise places all of the burden of the desegregative effort upon the young black child while permitting the young white child to attend a neighborhood school. They postulate that the early primary grades are the most formative years of a child's educational experience. Continuity is extremely important during these years. The ability of a kindergarten teacher to discuss a child's problems and progress with a first grade teacher, and the first grade teacher with the second, is important educationally to both white and black children, but even more so to the child from a socioeconomically deprived background in which parental support may not be as present. Plaintiffs point out that under the proposed plan, as well as under the 1971 order, the inner city black child never goes to the same school for first grade as he does for kindergarten.

Another claimed damaging impact on young black children in the plan is that, in most instances, the black children are taken from a familiar, friendly, supportive environment into what can often be a hostile and unfamiliar environment. This is asserted to be particularly harmful to black children from an underprivileged socioeconomic status. Once again, it is also harmful to white children, but not as severe in higher socioeconomic families.

A third problem cited by plaintiffs with the transportation of young black children away from their familiar environment in the early grades is the inability to have parental contact and input. Parents of lower socioeconomic status are much less likly to have linkage with the teacher, particularly when the assigned school is in a distant suburb inaccessible by public transportation.

B. Educational Unsoundness of the Four-Tiered Structure

Under the proposed Board plan as well as under the present 1971 order, most children will go to at least four schools during

their K-12 school experience and almost all black children will go to five schools. Not only plaintiffs' experts, but also all those who testified for intervenors as well as the Board, assert that a three-tiered structure is far more educationally sound. In its admission of this principle, the Board acknowledged that its use of a four-tiered structure plus kindergarten was chosen to facilitate the achievement of desired racial ratios.

C. Closure of Inner City Schools

The Board plan proposed to close five more elementary schools in or on the edge of predominantly black areas. In addition, under the various alternatives of the plan, Pearl High School is contemplated for either closure or conversion to a magnet school. Pearl is the only remaining historically black high school. Plaintiffs argue persuasively for the retention of Pearl because of its historic contribution to the black community of Nashville, the contribution of its graduates to the nation, its value as a source of ethnic pride and symbol of black achievement, and the fact that it is a sound structure, aesthetically attractive, and functional. The building was designed by black architects, constructed by black contractors, and has graduated black persons who have gone on to great achievements in the region and the nation. Such role models are of significant importance to young black children seeking to break out of the bonds of poverty and overcome the unfortunately still-present effects of our shameful two-hundred-year history of discrimination against the black citizens of this land. Substantial proof from many prominent black leaders was offered in support of these contentions.

D. The Rightness of Whiteness or "Osmosis" Effect

The Board plan and the 1971 plan are both premised upon a goal that the percentage of black students in each school represent the percentage of blacks in the county. This is justified upon the philosophy that each public school should be a

microcosm of the community it serves and that it is necessary to use such a percentage mix in order to have enough blacks "to spread around," thereby achieving racial balance in all schools, and upon the now questioned sociological studies that attempted to demonstrate an educational osmosis effect on a black child from being in a majority white school setting. Plaintiffs insist: (1) the microcosm effect is practically impossible; (2) the "spreading around" effect is inherently disparately burdensome to blacks; and (3) the osmosis theory is invidiously racist and based upon assumed black inferiority. Plaintiffs assert that to contend that a black child can receive a quality education only in a white majority classroom is blatantly racist and paternalistic. In addition, because the earlier sociological studies that may have indicated an osmosis effect have been subjected to such serious methodological question, and because more recent studies have indicated the incorrectness of the earlier conclusions, they should be disregarded.

This point of departure demonstrates the evolution of desegregation philosophy that has occurred among educators, sociologists, black parents, and plaintiffs in this litigation as well as in similar litigation across the country. Historically, black plaintiffs felt the necessity to be in a majority white school in order to be assured of equal distribution of educational funding. The assertion and recognition of the right to equal protection of the laws has rendered this reason irrelevant in today's climate. A dramatic role reversal has taken place. In this case, we have a white majority of the school board, acting on the advice of a white desegregation expert, recommending to the Court *more* busing to achieve *more* racial balance. Equally contrary to earlier posture, the black plaintiffs urge upon the Court *less* busing, *more* neighborhood characteristics to the assignment plan, and the permissibility of majority black schools.

Based upon these and other criticisms of the Board plan, the plaintiffs recommend specific features which any revisions should incorporate:

1. An intervention program that addresses the needs of students who are deficient in the basic skills, especially when such students are bused to schools not in their immediate neighborhood;

2. A program at all schools that provides relevant educational experiences geared to helping students acquire an understanding of the life and culture of black Americans;

3. Programs and services that address the needs of students, black and white, who are achieving below the national norms in the basic skill areas;

4. A mechanism that insures that black students do indeed gain equitable access to the specialized programs offered in the comprehensive high schools;

5. A commitment to the maintenance of Pearl High School;

6. The concept that either whites or blacks can constitute the minority racial group;

7. The maintenance of the kindergarten and the primary grades as an integral educational unit;

8. A busing formula that does not shift black students in disproportionate numbers to white students;

9. A commitment not to dislocate black students disproportionately in the kindergarten and early grades;

10. An improved systemwide ratio of black teachers and black administrators;

11. A policy that permits a greater number of black teachers to be assigned to predominantly black schools.

VIII. THE INTERVENORS' PLAN

The plan submitted by the intervenors was hurriedly prepared and therefore understandably lacks refinement in some of its

details. It consists of a three-tiered structure within six geographical clusters of elementary, middle schools, and high schools. The elementary schools are neighborhood in character and admittedly do not make maximum utilization of buildings, nor have the neighborhood lines been drawn with a view to maximize integration possibilities within the neighborhood concept. The range of black-white student population ratios for elementary schools within the various clusters are:

E Cluster—from 100 percent white at Union Hill to 99 percent black at Kings Lane

Q Cluster—from 94.4 percent white at Stratton to 82.7 percent black at Glenn

U Cluster—from 99.4 white at Stanford to 88.8 percent black at Caldwell

I Cluster—from 97.2 percent white at Berry to 86.7 percent black at Napier

T Cluster—from 98.7 percent white at Crieve Hall to 98.3 percent black at Ford Greene

Y Cluster—from 98 percent white at Harpeth Valley to 99.1 percent black at McKissack

(Exhibit 227). The elementary student assignment plan did not consider kindergarten, or special education students, or building requirements. (Exhibit 179).

The middle schools within each cluster join a number of the elementary schools to feed each middle school. No noncontiguous zones are utilized to achieve greater degrees of integration. The ranges of black-white student populations are:

E Cluster—from 97.4 percent white at Goodlettsville to 70.8 percent black at Ewing Park.

Q Cluster—from 94.4 percent white at Neely's Bend to 56.7 percent white at Highland Heights.

U Cluster—from 99.1 percent white at Two Rivers to 64.2 percent black at Meigs

I Cluster—from 94.6 percent white at Apollo to 80 percent black at Cameron

T Cluster—from 91.7 percent white at McMurray to 95.6 percent black at Wharton

Y Cluster—from 95.7 percent white at Bellevue to 42.7 percent black at West End

(Exhibit 227).

The high school plan envisions retention of the existing comprehensive high schools, but also would retain Pearl, Cohn, Bellevue, Joelton, Antioch, East, DuPont, Madison, and Goodlettsville as "traditional" high schools. An option would be offered to each student within each cluster of either a comprehensive or traditional secondary education.

The plan contains a number of voluntary components designed to foster community support and also to facilitate integration. Failure to achieve or maintain at least 10 percent racial minority presence (black or white) within a reasonable time after use of magnet programs and zone readjustments would result in closure of the school. If a school fell below 50 percent utilization it would be closed. Application for transfer from a "traditional" to a comprehensive high school which would have a negative impact on integration would be first subjected to a course offering at the "traditional" school to attempt to prevent the transfer.

The intervenors' plan emphasizes the use of public transportation facilities as both a money-saving device and as a method for establishing natural linkages among students, parents, and the receiving schools. The point is well made that access to a school by public transportation tends to foster parent participation in school activities and in the education of their children,

facilitate the participation of children in afterschool extracurricular activities, and encourage intercommunity relationships. As noted in the discussion of the Board's plan, noncontiguous zoning between communities, between which there is no public transportation and little other commonality, has many inherent problems and disadvantages. Close coordination between the Board and the Metropolitan Transit Authority is urged in establishing new routes and future school construction.

The high school plan departs from a consistent feeder pattern for the middle schools. For example, some children who went to middle school at John T. Moore in the "T"cluster will go to high school in the "Y" cluster. Some who went to West End in the "Y" cluster will go to high school in the "T"cluster. Litton middle schoolers will be split between the "Q" and "U" clusters. (Exhibits 225 and 226).

The intervenors urge the court to defer adoption of any plan until 1981-82 in order to implement their suggestion.

Although the voluntary components of the plan offer attractive alternatives designed to foster community support for the school system, the plan is defective in a number of respects.

First, it emanates largely from a parochial desire to maintain high schools in established communities such as Pearl, Cohn, Bellevue, and Joelton in contradiction to the Board's established policy (and state mandate) of a system of comprehensive high schools. There is a growing debate among professional educators as to the wisdom and educational value of comprehensive high schools. This Court need not enter or take sides in the debate except to the extent that the decision may facilitate or deter efforts to achieve a unitary system. Otherwise, it is an educational decision.

It is impossible to justify maintenance of Pearl, Cohn, and Bellevue in the southwest quarter of the county alongside the three comprehensive high schools (Hillwood, Overton, and

Hillsboro) that have been built in the same quadrant. At the anticipated enrollment for 1983, these three new comprehensive high schools could accommodate all students in the southwestern quadrant, leaving the Pearl, Cohn, and Bellevue buildings available for other uses, and still have *1156 empty seats.*[40] Under the same 1983 projections, the new Whites Creek Comprehensive High School can absorb all Joelton students and still have *372 empty seats.* (Exhibit 155).

Such underutilization seems economically unjustifiable and there is no basis upon which the Court could mandate it.

More importantly, the intervenors' plan substantially resegreates most of the proposed "traditional" high schools. Initially, Madison would be 97.8 percent white, DuPont would be 98.8 percent white, Antioch would be 96.2 percent white, Bellevue would be 97.1 percent white, and Pearl would be 92.7 percent black. Some of the currently integrated comprehensive high schools would revert to identifiably black or white schools: Overton would become 96.2 percent white, Hillsboro would become 95.9 percent white, and McGavock would become 96.4 percent white. Intervenors would rely on the voluntary components and magnet aspects of their plan to bring these schools to a minimum of 10 percent of either race as a minority in such

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[40] The following projections were made for 1983 (assuming the construction of both the Pearl-Cohn and Goodlettsville-Madison Comprehensive High Schools):

	Capacity	Students	Empty Seats
Hillsboro	1751	959	792
Overton	1819	1336	483
Hillwood	2190	1206	984
	2259		
Pearl-Cohn	1100	1103	−3

Thus if the Pearl, Cohn, and Bellevue students were incorporated into Hillsboro, Overton, and Hillwood, there would still be 1156 empty places. (Exhibit 155).

schools. However, the prospect of such an eventuality is unduly optimistic at best.

IX. THE COURT'S RESPONSIBILITY

A. *A "Unitary" System*

[1] Once a finding has been made that a racially discriminatory dual school system has been maintained,[41] it is the responsibility of the School Board, under supervision of the Court, to achieve a "unitary" school system. *Green v. County School Bd.*, 391 U.S 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). Perhaps intentionally, no precise definition of what constitutes a "unitary" system has been laid down. In *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20, 90 S.Ct. 29, 24 L.Ed.2d 19, 21 (1969) (per curiam), the Supreme Court mandated a system "within which no person is to be effectively excluded from any school because of race or color." This definition was reiterated in the concurring opinion of Chief Justice Burger in *Northcross v. Board of Educ.*, 397 U.S. 232, 237, 90 S.Ct. 891, 893, 25 L.Ed.2d 246, 250-51 (1970) (per curiam).

Pursuant to this Court's direction to seek public input to the proposed plan, the Board invited definitions of "unitary schol system" at its public hearings. Some of these bear repeating:

> By the nature of the title an Unitary School System implies oneness of opportunity for all children, oneness of administration, oneness of financial support, oneness of educational philosophy, oneness with Metropolitan Government, and oneness geographically centered at and emanating from the heart of the innercity.

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[41] The defendant, then Board of Education of the City of Nashville, conceded shortly after this case was instituted that the state laws under which defendant operated a dual system were unconstitutional. *See Kelly (sic) v. Board of Education.*, 159 F. Supp. 272 (M.D.Tenn. 1958); *Kelley v. Board of Educ.*, 139 F.Supp. 578 (M.D.Tenn. 1956).

Councilman William E. Higgins

> A Unitary School System is that system which is designed and functions to the extent that equal resources and access to quality education are available to all parts and groups of a given community.

Rev. Amos Jones, North Nashville Community Council & Social Action

> A unitary school system is one offering each student equal access to the facilities, materials and staff to provide the opportunity to meet his/her educational needs. This uniformity of opportunity must also extend to parent, family and citizen involvement in the educational system.

Exhibit 2 to plaintiffs' proposed plan, filed Feb. 11, 1980.

Brown v. Board of Educ. (Brown II), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), broke down barriers excluding black children from attending school with white children. *Green v. County School Bd., supra,* described the ultimate goal to be a unitary, nonracial system of public education, and onerated school boards to "come forward with a plan that promises *realistically* to work, and promises *realistically* to work *now.*" 391 U.S. at 439, 88 S.Ct. at 1694, 20 L.Ed.2d at 724 (emphasis added). *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), identified and utilized transportation of students to achieve racial mix, and gerrymandered zone lines and/or noncontiguous zones as permissible remedial devices to achieve a unitary system. *Milliken v. Bradley (Milliken I),* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), emphasized the *remedial* nature of the Court's responsibility and expanded the charge to include such action as would as nearly as possible "restore the victims of discriminatory condust to the position they would have occupied in the absence of such conduct." *Id.* at 746, 94 S.Ct. at 3128, 41 L.Ed.2d at 1092. *Milliken v. Bradley (Milliken II),* 433 U.S.

267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), specifically approved remediation in the form of educational components designed to "restore the victims of discriminatory conduct to the position they would have *enjoyed in terms of education. . . .*" *Id.* at 282, 97 S.Ct. at 2758, 53 L.Ed.2d at 757 (emphasis added).

Thus the definition of a "unitary" school system has expanded from *Brown* to *Milliken* from a mere destruction of barriers, to pupil assignment, to remediation and quality education.

B. *Racial Ratios*

As noted above, the thinking of sociologists, educators, legal scholars, black plaintiffs, and jurists has also undergone evolution. Earlier literature and studies of varying methodological purity postulated a benefit to black children from a school setting in which white middle class children were in the majority. This thinking has changed significantly.[42]

Swann may have been misinterpreted to state a requirement of racial ratios in all schools unless the Board could carry the heavy burden of proving the rationale of the exception. Thus, it has perhaps appeared that the achievement of racial ratios has become and *end* of litigation of this type, rather than the *remedy* it was conceived to be. District Judge McMillan, in the *Swann* case, indicated that such a future emphasis would be misplaced:

> This court has not ruled, and does not rule that "racial balance" is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor*

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[42] In his testimony during the hearings, Dr. Scott repeatedly questioned and criticized the assumption that it is necessarly more advantageous to black children to attend majority white rather than majority black schools. *See* discussion in section 4 of Part VI, *supra. See also* Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma,* 93 Harv.L.Rev. 518 (1980).

that the particular order entered in this case would be correct in other circumstances not before this court.

Swann v. Charlotte-Mecklenburg Bd. of Educ., supra, 401 U.S. at 25 n. 9, 91 S.Ct. at 1280 n. 9, 28 L.Ed.2d at 571-72 n. 9 (emphasis in original), *quoting with approval* from Judge McMillan's memorandum of August 3, 1970.

The Supreme Court, in *Swann,* observed the "familiar" metropolitan phenomenon (present in Nashville) of concentration of black population in one part of the city. It further recognized that, as a result of this phenomenon, "certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change." 402 U.S. at 25, 91 S.Ct. at 1281, 28 L.Ed.2d at 572. No specific degree of racial mixing is mandated by *Swann* nor is "desegregation" defined as requiring every school to reflect the racial composition of the system as a whole.[43]

Busing and zoning are "*permissible tool[s],*" 402 U.S. at 28, 91 S.Ct. at 1282, 28 L.Ed.2d at 574 (emphasis added), in fashioning a remedy. From *Brown II* forward, the courts' responsibility has been equitable in nature. "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies. . . ." *Brown v. Board of Educ., supra,* 349 U.S. at 300, 75 S.Ct. at 756, 99 L.Ed. at 1106.

[2] As remedies, each must be subjected to the traditional balancing tests required of a court of equity; effectiveness must

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[43] In *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976), the Court reiterated that there was no "substantive constitutional right [to a] particular degree of racial balance or mixing. . . ." *Id.* at 434, 96 S.Ct. at 2703, 49 L.Ed.2d at 607, *quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., supra,* 402 U.S. at 24, 91 S.Ct. at 1280, 28 L.Ed.2d at 571.

be weighed against other available alternatives, and each alternative must be assessed in terms of its relative costs. This was the command of *Brown II,* it was the lesson of *Green,* it was the essence of *Swann,* it reached full flower in *Milliken II.*

Such a balancing is particularly appropriate in the case before this Court. Here, we are not dealing with a "conversion from a dual to a unitary system," as the *Swann* Court faced. 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d at 572. This Court has been dealing with the problem for 25 years and this system has had in place a *Swann*-type remedy for nine years. Here we are assessing the effectiveness of the remedy and such changes as are made should be done in light of this experience.

X. THE EFFICACY OF THE REMEDY

[3] A partial assessment of the remedy under the 1971 order was contained in the recitation of history in Parts II-V above. It cannot be overemphasized that an evaluation and consideration of modifications to the *Swann*-type remedy in effect in this county could not be possible had a comprehensive desegregation order requiring busing not been decreed and implemented. Were this Court addressing the situation in this county as it existed in 1971, there would be no alternative but to order the implementation of a plan that entailed school pairings, noncontiguous zoning, and substantial busing. Nothing in this opinion should reflect a diminution of the realization of the necessity of such an order in 1971.

It is only after nine years of zoning and busing to achieve a desegregated system and the changes that have taken place in the community and in the attitude manifested by the School Boards that it is possible to reevaluate the efficacy of the remedy incorporated into the 1971 order. With this understanding, the Board's proposed plan will now be scrutinized as to its efficacy in terms of:

1. Its realistic promise of achievement of a unitary system;

2. Its relative burden on black and white children;

3. Its social cost in the deterioration of public support for education;

4. Its educational cost; and

5. Its economic cost.

A. *Realistic Promise of Achievement*

The Board's plan was proposed in good faith reliance upon the assumption that the August 1979 order of this Court and the legal precedent of *Swann* required a "more-of-the-same" type of remedy. The plan would achieve an initial racial mix in which blacks will, in nearly all cases, be in the minority. But will these ratios be realistically achieved or, if initially achieved, will they be capable of realistic maintenance?

The spectre that haunts all of the parties to this case, the Court, and the community is a public school system populated by the poor and black, and a private school system serving the affluent and white. The Board presented as one of its witnesses Dr. Richard A. Pride, Associate Professor of Political Science, Vanderbilt University. Dr. Pride was commissioned by the Board to study "Patterns of White Flight: 1971-1979," and his scholarly study and analysis appear in the record as Exhibit 247. Dr. Pride took the statistic of a decline in white enrollment in the public schools of 22,098 between June 1971 and June 1979[44] and sought to explain the decline. He found that:

> "white flight" is a significant problem in Nashville. In brief, it was found that in 1979 each cohort (grade level) was about 15 percent below what would have been expected in the absence of court-ordered busing, (2) this average cohort loss has increased since 1971, when the

[44] In June 1971, there were 66,393 white students in Metropolitan Nashville schools as opposed to 44,295 in June 1979.

> average cohort was only 8 percent below expectations, (3) most of the loss in recent years has occurred in the birth to first grade interval, where there was an average loss of 14 percent from expected levels, (4) there is a steady increase in the private school contingent in the school age population, including 1st grade, where the private schools captured 20 percent of the entering cohort in 1978-79, a 9 percent rise in eight years.
>
> White flight also manifested itself as within-system migration. The analysis found that there is a flight of up to 49 percent in some cluster schools located in black areas from among white cohorts which began school in desegregated 1-4 schools. The loss in cluster area schools is congruent with a marked gain in non-court-ordered 1-6 grade schools in many outlying areas.

R. Pride, *Patterns of White Flight: 1971-1979,* at 14-15 (1980). His most disturbing statistical prediction was that we can expect 25-30 percent of the elementary age children to be in private school in the middle to late 1980s. If the goal of previous efforts has been to achieve an integrated school experience, the depressing reality of Dr. Pride's study[45] is that our efforts have been less than fruitful, if not to some extent counterproductive.

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[45] An earlier study of Dr. Pride and Dr. J. David Woodard on the white flight phenomenon in Nashville, Memphis, and Louisville, entitled "Busing and White Flight: Implementation Plans in Three Southern Cities," was presented as Exhibit 246. In this connection, one should note that in the Coleman II Study, Exhibit 63B, Dr. James S. Coleman found that there is almost inevitable significant loss of white children from public school systems when desegregation occurs. He concluded the analysis of his study by stating:

> that the emerging problem with regard to school desegregation is the problem of segregation between central city and suburbs; and in addition, that current means by which schools are being desegregated are intensifying that problem, rather tha reducing it. The emerging problem of school segregation in large cities is a problem of metropolitan area residential segregation, black

This phenomenon is only partially the result of the remnants of racial prejudice. From the testimony in this case, the Court concludes that other parental concerns have a greater impact than the bus ride or racial prejudice. It was apparent from the testimony, from letters received by the Court, from letters received by the Board, *see* Collective Exhibit 170, and from the public hearings conducted by the Board, *see* Collective Exhibit 205, that the greatest concern is with the quality of education received, or perceived to be received. It was testified repeatedly that the important factor is what happens at the end of the bus ride rather than how long the ride.

Except to the extent that the largely undefined (and unfunded) magnet portion of the plan may be so designated, there are no educational components to the plan. It is merely a student assignment plan to provide racial ratios. Such a further disruption without massive efforts to make the public school system more attractive will further deteriorate public support and will engender more flight to private schools. The witnesses for all parties predicted such an increase as an inevitable result of the plan, and the Court so finds.

Further, in consideration of the efficacy of the 1971 remedy and the hoped-for efficacy of the Board plan, the Court received testimony on the improvement in achievement test scores of both black and white children from 1971 to the present. *See* Exhibit 249. No scores were available before 1971 and thus no basis of comparison existed for pre-busing achievement. Dif-

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central cities and white suburbs, brought about by a loss of whites from the central cities. This loss is intensified by extensive school desegregation in those central cities, but in cities with high proportions of blacks and predominantly white suburbs, it proceeds at a realtively rapid rate with or without desegregation.

J. Coleman, S. Kelly & J. Moore, *Trends in School Segregation, 1968-73,* at 79-80 (1975). Dr. Coleman's description of cities in which the black population is concentrated in the central city and the suburbs are predominantly white applies to Nashville-Davidson County and is the crux of the problem in this county.

ferent tests were utilized and the statistics for some years may not be comparable. However, there does appear to have been improvement in both black and white stanine scores in both math and reading over the period. The gap between black and white achievement has narrowed slightly, but average black achievement in both math and reading is still well below national norms and the gap between black and white achievement remains substantial.[46]

The "osmosis effect," or use of white children as a principal learning resource for black children, appears not to have had the desired result, at least in isolation. These data strongly suggest the necessity for educational components both as an essential ingredient to the remedy and also as a reinforcement to partental perception of, and *support for,* the system. As noted by the Supreme Court in *Milliken II,* and as is obviously present in this case, "[p]upil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures." *Milliken v. Bradley,* 433 U.S. 267, 287-88, 97 S.Ct. 2749, 53 L.Ed.2d 745, 760 (1977).

B. Disparity of Burden

The Court finds that the plan submitted by the Board disparately onerates young black children with the burden of achieving desegregation.

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[46] In 1978 the average reading gap ranged from 1.2 stanines in the second grade to 1.62 stanines in the eighth grade. Narrowing of the reading gap by grade level from 1971 to 1978 ranged from a .1 reduction in the sixth grade to a .65 reduction in the second and third grades. Improvement in recent years seems to have plateaued and little reduction appears after 1975. Exhibit 149. *See also* Report on Standardized Testing, prepared by the Board in February 1979, Collective Exhibit 240, in which the Board reported that 77 percent of the public school students in this county achieved scores in reading and mathematics at a level average to or above the national test scores.

As noted above, with few exceptions, black children do not attend the same school for grade one as for kindergarten. Also with few exceptions, black children are bused out of their neighborhoods for grades 1-4, while white children remain in their neighborhoods for these early grades.

The Court drove the route from North Nashville to Andrew Jackson School. The route covers 20.6 miles and required 42 minutes. More significant, however, than the time or distance is the inaccessibility of the area by other than automobile. A child who becomes ill at school and needs a parent, or a parent who needs a conference with a teacher, will create a transportation problem requiring an expensive solution by taxi or a very time-consuming bus ride with transfers if the parent does not have an automobile. This defies logic and creates an almost impossible barrier to liason between parent and teacher. These children *never* attend a school in their neighborhood for the entire twelve years, unless they elect for the grades 1-2 Buena Vista option.

Similarly, young black children from the Cameron area are taken substantial distances to Una, Lakeview, Cole, and Haywood. Haynes area young black children travel to Old Center, Gateway, and Amqui. Wharton area young black children travel to the southeast corner of the county to Brookmeade, Gower, and Westmeade. Children in the area of Caldwell School (proposed for closure) would go to a yet undetermined school for kindergarten, travel to Baxter for grades 1-2, travel on out to Chadwell, Stratton, and Neely's Bend in 7-8 and Madison and Goodlettsville (or Goodlettsville-Madison Comprehensive High School) for 9-12. Black children in the shadow of Head Elementary School and Pearl High School would go to Head for kindergarten, travel out to Hill, Woodmont, Sylvan Park, or Eakin for 1-4, come back in to Head for 5-6, travel out again to Apollo for 7-8, and out again to Antioch for 9-12.

No similar treatment of white children exists.

C. The Social, Educational, and Economic Costs

The potentially devastating social cost of a public school system serving only the lower socioeconomic segments of our society has been alluded to earlier. The prospect of such divisiveness, and its probable geometric progression into post-school societal interaction, is frightening. Public education is the cornerstone of democracy, but public education without public support will almost certainly erode to the point that it will no longer represent this solid base upon which we can continue to build.

Dr. Pride's testimony is undisputed and is supported by other witnesses. The Board plan will not only fail to engender a revival of public support, it is also uniformly predicted to engender further exodus from the public school system. The Court finds that such a result negates the efficiacy of the remedy, and it is an unacceptable social cost.

The educational concessions made to facilitate achievement of desired ratios have also been referred to above. The choice of a four or five-tiered system over the educationally preferred three-tiered system is only one of these. The lack of continuity for the child and the difficulty of liason between parent and teacher occasioned by the use of noncontiguous zoning, particularly in the early grades, is an admitted educational detriment. The inability of the child from noncontiguous zones to participate in extracurricular activities after school is a further admitted educational cost of the plan. The allocation of a finite amount of resources to transportation costs rather than educational improvements is inherent in the plan. Dr. Bill Wise, Assistant Superintendent of Schools and a principal witness for the Board, testified that elimination of the cost of transporting students in the first four grades would be sufficient to reduce the pupil-teacher ratio from 25-1 to 15-1 in those grades. The overwhelming testimony from the educator experts was that the

remedial benefits of small pupil-teacher ratios in these early grades would far exceed any benefit obtained from an "osmosis" effect. Such educational costs weigh heavily in the balance of this consideration of the efficacy of the remedy.

The Board plan would add transportation costs of $3.5 million with the use of elementary magnets. (Exhibit 192). This Court judicially notices the existence of a national fuel crisis as well as a serious downturn in the economy. Fuel prices are many times what they were when the plan was implemented in 1971. Some transportation will continue to be necessary. However, rational balancing of cost-benefit demands a consideration of alternative methods of transportation that may be more efficient, and alternatives to transportation as a remedial device.

For all of the above reasons, the Court must reject the Board's proposed plan. The intervenors' plan, although it offers attractive and creative ideas, must also be rejected because of its lack of refinement and the flaws noted in Part VIII above.

The Court lacks the resources to devise modifications to either the Board's plan or the intervenors' plan or to develop an alternative plan on its own. It is necessary, therefore, to refer the plan back to the Board under more specific guidelines. Such a re-referal may result in a deferral of implementation of parts or all of the plan for the coming school year 1980-81. Upon a consideration of this opinion and the guidelines hereinafter set out, the Board will report to the Court by July 1, 1980, on the feasibility of the generation of a new plan for the 1980-81 school year or any parts thereof and the necessity for deferral of development and/or implementation of any such parts.

XI. GUIDELINES AND SPECIFIC DIRECTIVES

A. Tier Structure

[4] The Board chose a four-tiered structure against its better educational judgment in order to facilitate racial balance. In

view of the directive which follows this, the Board may now revert to a three-tiered structure. Whether this should be a K4-4-4 or some variation thereof which is more educationally sound and makes better utilization of buildings is a matter for Board determination.

B. *K-4 (or variation) of a Neighborhood Character*

As recognized in *Swann v. Charlotte-Mecklenburg Bd. of Educ., supra,* transportation of young children which "risk[s] the health of the children or significantly impinge[s] on the educational process" is to be avoided. 402 U.S. at 30-31, 91 S.Ct. at 1283, 28 L.Ed.2d at 575.

For all of the reasons set forth in the findings above, the Board should construct its first tier of kindergarten through early elementary grades of a neighborhood character. Intervenors attempted such a construction under severe time constraints. The expert staff of the Board can do a more refined job, drawing lines that achieve better utilization of space, considering the need for kindergarten, special education, and other federally funded programs, and also maximizing the opportunities for integration.

C. Middle Schools

A 5-8 (or variation) middle school tier should be constructed which clusters schools from the first tier, but with the objective in clustering of bringing about a miniumum presence of at least 15 percent of either race in the minority at each middle school. If necessary to meet this objective, noncontiguous zones may be utilized. These should be held to a minimum and where utilized, consideration should be given to assignment of the nearest such black or white children to create such presence. In this respect, consideration should be given to transportation accessibility by public transportation between the noncontiguous zone and the assigned school, as more fully discussed below. The school chosen for the middle school in each cluster should be

centrally located as possible to the whole of the students assigned thereto. Exceptions to this objective may be dictated by the location of buildings large enough to accommodate the student population.

The selection of 15 percent is arbitrary, as is any other number which may be chosen. Preparation of students to live in a pluralistic society makes a biracial, intercultural experience highly desirable. However, it was not the intent of *Brown* and its progeny to require blacks always to be in the minority; nor should these precedents have been read to require assimilation or amalgamation. It is not undemocratic, nor does it violate equal protection of the laws to have a system that allows for recognition of and respect for differences in our society. A rigid adherence to racial ratios premised upon the social goal of assimilation, which in the process demeans, diminishes, or benignly neglects cultural and ethnic pride as well as differences, is not only constitutionally unrequired, but socially undesirable. (*See* testimony of Dr. Walter Leonard.) The 15 percent minimum objective was chosen at the suggestion of plaintiffs because it seems to represent a reasonable attempt to provide intercultural and interracial contact as a foundation for social harmony. As such it is a goal worthy of the wholehearted support of parents and the community, and for the attainment of which some expense and inconvenience should gladly be endured.

D. High Schools

The Board's initial plan after 1971 (with tacit approval from the Court at that time) of ringing the city with comprehensive high schools would have brought about complete desegregation. Had the job been completed and had there not been some errors of judgment in school placement, much of the present controversy could have been avoided. Ethnic attachment and insistence on the retention of Pearl, and community and parochial insistence upon the retention of Pearl, and community and

parochial insistence upon the retention of Bellevue, Joelton, and Cohn have created political problems for the Board in the pursuit and implementaion of its comprehensive program. The remoteness of Antioch and DuPont has created logistical problems and impeded efforts that would have further implemented this educational decision. Controversy has arisen concerning the validity of comprehensive high schools as an educational vehicle. Some community pressure has been exerted for at least a partial return to, or the option of, a smaller, traditional high school. Intervenors suggest through their equity plan the provision of such an option. Their suggestion has both educational merit and offers the hope of renewed support for the system. They err in the excess, however, from a desire to please as many as possible. By proposing the maintenance of all existing high schools, intolerable resegregation results, protected enclaves persist, and, pragmatically, serious underutilization of space is inevitable. The Board should consider the use of some traditional type high schools either as magnets per se, or containing magnet programs. Pearl, East, and West End apear to be well located geographically for such a magnet approach. All are in or near the central city and are served by public transportation. The number and location of such magnet-traditional high schools is a matter for Board determination in the exercise of its educational function and in consideration of financial constraints.

1. *Goodlettsville-Madison-Trinity Hills*

This proposed new comprehensive high school has been recommended by the Board since 1972. Land has been acquired. Building age and overcrowding have threatened loss of accreditation to existing high schools in the area served. This construction was a part of the initial plan of the Board for a ring of comprehensive high schools and promises to aid substantially in achieving desegregation. It should be built and the Court approves this portion of the Board's plan with attendance zones set out in Exhibit 14B. However, as discussed *infra,* the Board

should include in the attendance zone and construct accommodations for the Old Hickory area (northern half of DuPont zone) in this school. These children can cross the river at Old Hickory Boulevard and are as close or closer to the site as most of the remainder of the zone. There is natural affinity between the Old Hickory and Madison communities. Such a zone modification will relieve overcrowded conditions in the DuPont zone, offer comprehensive education to the children in this zone, and will further integration without the use of the present noncontiguous zone for DuPont from inner city North Nashville. The lower half of the DuPont zone can be assigned to McGavock.[47]

2. *Pearl-Cohn Inner City Comprehensive High School*

The Board has determined the advisability of an inner city comprehensive high school and proposed to construct it in the approximate center of a zone now served by Pearl and Cohn High Schools. Although the economic justification may be subject to some question,[48] other considerations weighed heavily with the Board and are equally persuasive to the Court. Both

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[47] In 1983, DuPont is scheduled for only grades 10-12 with a population of 967 and a capacity of only 784. McGavock will have 438 empty seats. The addition of some seats to Goodlettsville-Madison-Trinity Hills, plus the relief to be anticipated from some students attending magnet high schools should easily accommodate these DuPont area students. In addition, the DuPont anticipated student body includes students from a noncontiguous zone in North Nashville which will be discussed in the next section. Such a solution eliminates the need for $1,365,000 expenditure for an addition to DuPont. Exhibit 193.

[48] See discussion of the availability of seating projected for Hillwood, Hillsboro, and Overton, note 49 *infra*. However, with the closure of Bellevue, Antioch, and DuPont as hereinafter discussed, and with the assignment of students from the noncontiguous zones in the natural Pearl-Cohn area from Antioch and DuPont back to a Pearl-Cohn Comprehensive High School, this excess capacity will not be as present.

Pearl and Cohn have a long and rich heritage of service to their communities. Both have provided outstanding graduates to the region and the nation. Adjoining as they are goegraphically, they will bring together a natural racial mix that will enhance the desegregation effort. The combination of names and communities will preserve the symbolic significance of the predecessor schools, and will provide an inner city structure offering comprehensive education to a contiguous and natural zone. Assignment of children in North Nashville (presently assigned to distant DuPont) and children from the Pearl-Head area (presently assigned to distant Antioch) will increase student and community identity with the school, and reduce transportation costs. Adjustment of the southern boundary of the zone, *see* Exhibit 164, to West End Avenue will increase the white percentage of students.

The construction of Pearl-Cohn Comprehensive High School is approved.

3. *Bellevue, Antioch, DuPont, Joelton*

These relatively small high schools in the outer fringes of the county have posed a problem to the Board both in implementation of its comprehensive high school plan, and in its efforts to achieve a desegregated system. There has been understandable community resistance to their closure. Attempts to bring about a black presence in Antioch and DuPont have necessitated distant noncontiguous zones and excessive transportation costs. All four of these noncomprehensive schools should be closed or converted to middle school or other uses.

Whites Creek was built to accommodate Joelton students. Hillwood was built to accommodate Bellevue students. Antioch students can be accommodated between Glencliff and

Overton.[49] DuPont area students can be accommodated between the new Goodlettsville-Madison-Trinity Hills Comprehensive High School and existing McGavock.[50]

4. *Proposed Addition to Maplewood*

In the Long Range Plan, with the building of Goodlettsville-Madison-Trinity Hills, Maplewood is projected to have a student body of 1734, 54 percent black, and a permanent capacity of only 1091 plus 499 portable classroom spaces. (Exhibit 155). The Board, therefore, proposes to build a $4,775,000 addition to Maplewood to accommodate 700 students. Since this decision does not affect desegregation efforts, the Court does not either approve or disapprove the proposal. However, adjacent Whites Creek will have 372 empty spaces in the same Long Range projection. If East is opened as a magnet school, much of this overcapacity should also be relieved. Cost consciousness and prudence would seem to dictate a delay in this capital expenditure to determine if zone adjustments to Whites Creek and magnet enrollments do not obviate this problem.

5. *DuPont High School*

As noted above, DuPont should be closed. The proposed addition of $1,365,000 to this fringe area school would further frustrate efforts to achieve desegregation. this expansion is disapproved.

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[49] In the 1963 projection (Exhibit 155) Glencliff will have 308 empty seats and Overton will have 483 empty seats. Antioch is projected to have 1295 students, including 263 students from the noncontinguous Pearl-Head area zone. Excluding these students after their assignment to Pearl-Cohn, *see* section 2 *supra*, there would be 241 more students at Glencliff and Overton above capacity. Some adjustment of zone lines may be necessary from Overton to Hillsboro, which contains 792 empty seats, or the overage may be taken care of by the magnet schools, discussed in section E *infra*.

[50] McGavock is projected to have 438 empty seats in 1983.

E. *Magnet Schools*

The use of magnet schools as an adjunct to a pupil assignment plan not only offers a voluntary component to the desegregation plan but also adds significantly to the quality of the educational offering. It has proven effective in a number of cities as a method of achieving voluntary integration.[51] Intervenors demonstrated a substantial desire on the part of many residents of the county for the option of more traditional-type high schools. It appears that the utilization of magnet-type programs contained within several such traditional high schools, would be a significantly beneficial component to the plan. If these traditional high schools were open-zoned, centrally located, accessible by public transportation, offering unique educational opportunities, they should attract an integrated student body. Pearl, East, and West End all seem to meet these criteria. Pearl in particular should be considered for such alternative use. It is an attractive, functional building, accessible by several MTA routes. Such a usage would preserve the building as a source of black pride and symbolism in the North Nashville community. East and West End offer similarly attractive locations and existing facilities. Different magnet programs for each school should be considered.

This component of the plan is left to further development by the Board. Substantial savings should result from decreases in transportation costs in the elementary grades, from use of MTA services, discussed *infra*, and from reduction of noncontiguous zones. These resultant savings should be applied to this and other educatinal components of the newly devised plan.

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[51] *See* N. Estes & D. Waldrip, *Magnet Schools: Legal and Practical Implications* (1978).

F. *Transportation*

1. *Use of Metropolitan Transit Authority [MTA]*

One of the most appealing parts of the intervenors' plan was the proposal for close cooperation with and maximum utilization of the MTA system. It was shown that in many instances, MTA buses travel out toward suburban schools in the mornings virtually empty in order to bring commuters into the city to work. This is generally near school starting time. In the afternoons, MTA buses travel out with some of the same commuters only to return empty. It was further pointed out, and alluded to earlier in this opinion, that the availability of MTA transportation to a school tends to eliminate a feeling of alienation from the school, enhance the opportunity for parent-teacher liason, and open opportunities for after-school participation in extracurricular activities. MTA could establish feeder lines to operate in conjunction with shuttle buses and thereby reduce the number of buses and drivers required by the Board. The opportunities for cooperation and substantial savings in transportation cost are many. They await only imaginative exploration by transportation experts for the Board and MTA.

The Court is assured of MTA cooperation. The Court directs the Board to immediately initiate and pursue discussions with MTA and to incorporate maximum utilization of public transportation in the design of the middle school plan and high school transportation services.

One of the major deficiences of the present plan and the Board's proposed plan in the absence of any consideration of transportaion for students who desire to participate in after-school, extracurricular activities. The plan must incorporate a reasonable accommodation of this essential component of an education.

Discussions with MTA and planning for open-zoned magnet schools must also consider public transportation as a complement, if not the primary resource, in achieving access to such magnets.

G. *Educational Components*

1. *Elementary Schools*

Substantial savings will accrue from the elimination of transportation for racial balance in the elementary schools affected by this order. Savings realized from this source should be utilized for educational improvement throughout the system. The Board shall consider and report its recommendations for educational components to the plan to the Court. Such educational components should be directed toward:

1. Provision of intercultural experiences on a periodic basis to those K-4 children who, because of lack of integrated housing in their zoned neighborhoods, are largely black or largely white elementary schools;

2. Reduced pupil-teacher ratios in those schools in which the achievement level of the school is below the average for the system;

3. Remediation efforts in those schools or classeswithin schools made up largely of socioeconomically deprived children who suffer the continuing effects of prior discrimination;

4. Such other areas as the professional staff may recommend and the Board may consider valid in developing ways to attack the problem of disparate achievement between black and white children, and, in general to improve the quality of education in Metropolitan Nashville-Davidson County.

2. *Curriculum on Black History and Culture*

Plaintiffs persuasively represented that this area of education has been largely ignored. The contributions of the black men and women of this country to the progress of our nation is a source of inspiration to children, black and white. The Board responded with a broad brush assertion, without specific examples, that such instruction has been generally incorporated into the curriculum. No evidence was offered that this is being

done in a meaningful way or that its implementation was monitored to insure its realization. The plan of the Board will specifically address this question and propose methods of monitoring inclusion of such subject material into the regular curricula, as well as the offering of specific courses on black history and culture in the comprehensive high schools.

3. *In Service Training and Teacher Assignment*

The Board's proposed professional development program, "Together We Can-Together We Will," Exhibit 254, outlines a positive approach to development of understanding, sensitivity, and cooperation in the implementation of a desegregated effort. It represents a good start. The Board and its staff should study further efforts in this regard and propose as a part of the revised plan specific efforts toward:

1. Insuring that teachers and staff are required to undergo sensitivity training to the special needs of black children from an underprivileged social environment; and

2. Insuring that the most sensitive of such teachers are assigned to those schools and classes where the desegregation experience is likely to be most problematic.

H. *Faculty-Staff Ratios*

Consideration of black-white ratios in the composition of faculty and staff was reserved until a later stage of the proceedings. Nevertheless, some testimony with respect thereto crept into the hearings thus far. Pending further hearings, the revised plan of the Board should include an affirmative action recruitment and hiring program that emphasizes the replacement of vacancies occuring by normal attrition with black personnel.

I. *Involvement of Plaintiff and Intervenors*

The Court has been impressed by the generosity of spirit and cooperative attitude demonstrated by the parties and counsel

throughout the hearings on the matter. The Court believes this manifestation of good faith and common desire to achieve a workable solution to difficult problems is representative of the enlightened attitude of the great majority of the general populace of this county.

It is a solid foundation on which to build and we must nurture the climate thus created. In this regard the plaintiffs and intervenors are each directed to designate at least one representative of their choosing to attend regularly scheduled work-discussion sessions with staff members of the Board who are responsible for preparation of the report ordered by this Court on July 1, 1980. Utilization of these persons as a resource, and information relayed from them back to the parties can faciliate finalization of a plan and continue to foster the spirit of cooperation. It is not necessary to reiterate the non-adversarial, non-traditional character of the effort in which we are engaged.

J. *Involvement of the Community*

It is the fervent hope of this Court, in its official capacity, and in its unofficial capacity as a resident and parent, that the plan which eventually emerges from these efforts will be one which promotes equal educational opportunity, enhances interracial and intercultural communication and understanding, and improves the quality of education offered to all the children of this community.

To insure the success of the plan, the success of public education in Davidson County, and the success and happiness of our community in the future, it will be essential to enlist and utilize the good will and support of the community. The Board should develop a plan to enlist the aid of such groups as The League of Women Voters, Leadership Nashville, Metropolitan Nashville Community Education Alliance, the Metropolitan Mayor and Council, the media, civic and service organizations, to name only a few of the infinite resources available.

APPENDIX H

Robert W. Kelley, Individually and
representative of the class

v.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.

Henry C. Maxwell, Jr., Individually
and representative of the class

v.

Metropolitan County Board of Education of
Nashville and Davidson County, Tennessee, et al.

Civ. A. Nos. 2094, 2956.

United States District Court,
M.D. Tennessee,
Nashville Division.

Aug. 27, 1979.

(Rendered Orally Aug. 24, 1979)

In desegregation action, the District Court, Wiseman, J., held that: (1) given the choice between further delay and implementation of desegregation plan or a haphazardly hurried piecemeal implementation of a portion of the program, court would permit additional year's delay; (2) board's transfer policy, although facially neutral, was having a negative impact; (3) it would violate due process to hold school board members in contempt for the implementation of the school transfer policy where the prior orders of the court had not addressed the matter with sufficient specificity; (4) school board would be required to review transfer applications and determine this validity before granting them; and (5) the application of any senior to be transferred to the school which he attended as a junior could be granted.

Order accordingly.

Avon N. Williams, Jr., Richard Dinkins, Nashville, Tenn., for plaintiffs.

William R. Willis, Jr., Marian F. Harrison, Nashville, Tenn., for defendants.

MEMORANDUM

Wiseman, District Judge.

This twenty-four-year-old case is before this Court upon a series of motions and petitions by both the plaintiffs and defendants. The various motions, petitions, and pending matters and dates of filing are as follows:[1]

1. March 17, 1972: Defendants' request for approval of construction of White's Creek Comprehensive High School, included in March 17, 1972, report to this Court and merged into July 24, 1978, petition, listed *infra*.

2. May 30, 1973: Petition by defendants for approval of long range plan, dealing with twenty-six building projects. This petition has essentially merged into more recent pleadings.[2]

3. May 31, 1973: Defendants' petition for approval of portables for use in kindergartens. No action was taken by the Court in regard to this petition and the defendants subsequently implemented the proposed plan.

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[1] Throughout the pendency of this case until and during the recent hearings, the parties have filed various motions relating to discovery matters. The Court has ruled on substantially all discovery issues as they have arisen. Such matters are, therefore, not listed above as pending motions.

[2] Subsequent to the May 30, 1973, petition, defendants have filed various letters to inform the Court of their plans and actions taken relating to the projects detailed in the petition.

4. October 14, 1976: Defendants' motion to amend their May 30, 1973, petition for approval of long range plan. Such motion proposed a new location for the Goodlettsville-Madison High School and asked the Court for approval of construction of that school.

5. December 27, 1976: Plaintiffs' petition for contempt and further relief. Plaintiffs therein moved that defendants be held in contempt for their plan to construct the Goodlettsville-Madison High School, the expansion of Hillsboro, Bellevue, Hillwood, Glencliff, Stratford, and Maplewood high schools, the use of portables for kindergartens, the establishment of the Cole Annex for Cole Elementary School grades five and six at the old Turner School, and the proposed closing of Pearl High School. The Board of Education subsequently rejected the proposal to close Pearl. In this petition, plaintiffs also asked that the Court modify its 1971 order to equalize the burden placed on black and white children as a result of bussing, to compel defendants to maintain a black-white staff ratio commensurate with the black-white ratio, and to force defendants to upgrade Pearl High School and inner city schools. Finally, plaintiffs requested attorneys' fees.[3]

6. July 24, 1978: Defendants' petition for approval of school attendance zones for 1978-79, as amended August 18, 1978. In this petition, defendants requested court approval of the expansion of Hillsboro, Hillwood, Overton, Maplewood, Glencliff, and Stratford into comprehensive high schools with grades nine through twelve, the addition of grade nine to Cohn and Pearl high schools and to McGavock Comprehensive High School, the opening of the Whites Creek Comprehensive High School to include grades nine through twelve, the eliminating of one grade

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[3] Plaintiffs had previously filed motions for attorneys' fees on February 8, 1974, and April 11, 1975, as well as a motion to dispose of those motions, filed on October 16, 1975.

schools, the changes in zoning to alleviate overcrowding and to close inadequate buildings, the plan to develop an inner city comprehensive high school, and the establishment of junior high schools including grades seven and eight with feeder systems into the high schools.[4]

7. August 28, 1978: Plaintiffs' amendment to petition for contempt and for further relief, previously filed on December 27, 1976, and discussed *supra*. Plaintiffs therein allege that construction and expansion of schools in predominatly white areas, and the closure of formerly black schools in the inner city, the institution of optional transfer programs, discussed *infra*, and the failure of defendants to increase the black-white faculty ratio are violative of the 1971 court order.

8. August 7, 1979: Plaintiffs' motion for contempt, which charged that defendants had violated the Court's order directing defendants to terminate the optional transfer plan, discussed *infra*.

In pretrial conferences held with all parties, the Court divided the matters into four phases:

Phase 1: Historical recapitulation of school integration since the order of 1971; consideration of the Long Range Plan of the school board; consideration of the proposed zoning for school

[4] On May 29, 1979, defendants filed an amendment to the list of capital improvements and to proposed attendance zones, in which plaintiffs deleted from the May 30, 1973, petition a request for approval for an Interstate 40 West comprehensive high school, and substituting a plan for an inner city comprehensive high school, and modified the proposals relating to Antioch, DuPont, and Bellevue high schools. On July 6, 1979, the Court granted the defendants' amendments to their request for approval of certain building projects, in which defendants withdrew their request for approval of construction of Antioch High School, the Glengarry Elementary School project, the Jordonia-Wade Elementary School project, and omitted the projects proposed for DuPont and Bellevue high schools.

year 1978-79 (now moot since the year 1979-80 was only one month away at the time of the hearing); consideration of the Board's request to proceed with certain construction projects.

Phase 2: Consideration of matters relating to racial mix of staff and faculty.

Phase 3: Consideration of all petitions for comtempt.

Phase 4: The matter of attorneys' fees.

The Phase 1 hearings began on June 26, 1979, and continued on June 27, 28, 29, 30, 1979, and July 2, 3, 5, and 6, 1979. The proof on Phase 1 overlapped substantially with the matters of Phase 3.

At the conclusion of this hearing, the Court directed the defendant, Board of Education, to reconsider its entire plan assuming no parameters heretofore ordered by the Court, but with the primary objective of the achievement of a unitary school system for the entirety of Davidson County. In addition, the Board was instructed to consider: maximum utilization of existing buildings (specifically including those in the inner city); economic factors of transportation costs and fuel ecomomy; time and distance involved in transportation; and any other factors which would impact upon the ultimate objective of a quality educational opportunity for all children in Davidson County through a unitary school system.

The defendant Board has advised the Court that the foregoing request of the Court is a massive undertaking which, if approved by the Court, will represent a substantial redrawing of zone lines and transfer of numerous students.

From the proof adduced on Phase 1 of the hearings, the Court finds the following:

1. The perimeter line drawn by the Court in 1971, by which no requirement of either transportation or attempts at racial balance was mandated outside the perimeter, has encouraged

white flight to the suburbs and to those school zones unaffected by the 1971 order. The combined effect of the order and the flight therefrom, either to suburban public schools or to private schools, has been:

a) that inner city schools have become progressively resegregated;[5]

b) that the projected ideal ratio of 15 percent to 35 percent black population in each school has become increasingly more difficult to meet;

c) that the school facilities outside the Court-ordered perimeter have become increasingly inadequate to accommodate the growing student bodies.

2. The resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the im-

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[5] The most dramatic example of such resegregation can be seen in enrollment statistics for Pearl High School for the school years 1970-71 through th projections for 1979-80, compiled in Exhibit 87, as follows:

	Black Students/ Percentage Black	White Students	Total Students
1970-71	1212 (100.0)	0	1212
1971-72	599 (62.9)	353	952
1972-73	603 (66.4)	305	908
1973-74	594 (68.4)	274	868
1974-75	558 (74.7)	188	746
1975-76	551 (72.5)	208	759
1976-77	551 (75.8)	175	726
1977-78	492 (83.1)	100	592
1978-79*	577 (96.6)	20	597
Projection			
1979-80	532 (96.6)	19	551

*9th Grade Added

plementation of the Court's order, amounts to a *de jure* segregation.

Recognition of the above results impels a complete reexamination of the remedy fashioned in 1971. As the United States Supreme Court has said,

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. . . . Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. . . .

Green v. School Bd. of New Kent County, 391 U.S. 430, 439, 88 S.Ct. 1689, 1695 20 L.Ed.2d 716, 724 (1968). *See also Swann v. Charlotte-Macklenburg Bd. of Educ.*, 402 U.S. 1, 19-21, 91 S.Ct. 1267, 1278-79, 28 L.Ed.2d 554, 569-70 (1971).

[1] Although any delay in achieving an adequate remedy to a situation in which Davidson County children are deprived of constitutional rights is distasteful, the alternatives and the most appropriate remedy among such alternatives have not yet been the subject of proof in this case at this time. The Court is therefore left with the equally untenable choices of a further year's delay or a haphazardly hurried construction of partial patches which would undoubtedly worsen the situation. The problem faced by the parties in this suit, by this Court, and by the citizens of this county is of paramount importance. It deserves the best efforts at resolution that can be mustered by everyone concerned. It is a subject upon which the best minds available to the parties, including input from the many well-motivated, thoughtful citizens of the community, should be

sought and received. The 1979-80 school year is less than a week away. Massive restructuring of zones at this time would be chaotic. For all of these reasons, delay, however undesirable, becomes the only option available to the Court. The proposed zones of the Board for the year 1978-79 are approved for use in 1979-80. Over the coming year, this Court will hear from the parties, and invites amicus briefs by groups such as the Citizens Advisory committee, Parent-Teacher groups, and any other interested group. The Court encourages such groups to submit proposals which are designed to achieve a unitary school system in Davidson County and to provide the best possible educational opportunity for all of the school children of the county.

The Optional Transfer Policy

In 1978 the School Board adopted a transfer policy which permitted any student assigned to a non-comprehensive high school to opt out automatically of such school to a comprehensive high school (Exb. 21). At the July hearings, it became evident to the Court that this provision had been utilized extensively by white students assigned to Pearl to escape such assignment. The percentage of automatic options out of Pearl compared to those from other non-comprehensive high schools

leaves no other credible inference.[6] The effect of this policy

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[6] Exhibit 20 itemizes the number of students who transferred to a comprehensive high school from non-comprehensive high schools in 1978-79 under the optional transfer program. Interpolating these figures to reflect the number of students transferring from Pearl and other non-comprehensive high schools to comprehensive high schools, the resulting chart is as follows:

School	White	Black	Other	Total
From Pearl	290	21	12	323
to Glencliff	34	0	0	34
to Hillsboro	35	10	2	47
to Hillwood	220	8	10	238
to Overton	1	3	0	4
From Antioch	62	5	0	67
to Glencliff	62	5	0	67
From Apollo Jr.	50	1	0	51
to Glencliff	50	1	0	51
From Bellevue	8	0	0	8
to Hillsboro	8	0	0	8
From Cohn	66	19	0	85
to Hillsboro	31	14	0	45
to Hillwood	35	5	0	40
From Madison	47	2	0	49
to Maplewood	1	0	0	1
to Whites Creek	46	2	0	48
From DuPont (Jr. & Sr.)	37	4	0	41
to McGavock	37	4	0	41
From East	10	3	0	13
to Stratford	10	3	0	13
From Goodlettsville	68	5	0	73
to Whites Creek	68	5	0	73
From Joelton	149	0	0	149
to Whites Creek	149	0	0	149
From Neely's Bend	3	0	0	3
to Whites Creek	3	0	0	3
Total	790	60	12	862*

*Exhibit 20 also reflects that 11 white students transferred from Hillsboro to Hillwood. Since those transfers are not from non-comprehensive schools to comprehensive high schools, they are not listed in the above chart.

upon the already-established trend toward resegregation at Pearl was disastrous. From the 1977-78 school year to the 1978-79 year, the black to white ratio went from 83.1 percent to 96.6 percent (Exh. 87).

At the hearings in July, when the foregoing facts became apparent, the Court orally enjoined the Board of Education from further implementation of this transfer policy. The Court's directive from the bench was:

> I am making this ruling now, Mr. Willis, because as I see the urgency of the situation that has arisen during the course of the proceedings, I think I need to do that because you need to know what I am deciding on in the 1978-1979 [sic][7] school year. I think it is going to take considerable work by the School Board on this ruling because it is going to move several hundred students or determine from them whether or not there is a bona fide reason for program transfers and in anticipating it on a program transfer basis rather than an automatic opting out. So, I am telling you that now, so you have plenty of time to work on it, we will continue to do that as we can through this hearing. I will supplement all of this in a written memorandum and give you a chance for appeal and whatever. When I see something I need to address in order to be ready for the 1978-1979 [sic] school season, I will address it.

Thereafter, on August 7, 1979, plaintiffs filed a petition for contempt alleging that the Board had failed to implement in good faith the Court's order. This petition was scheduled for the first order of business at the resumed hearings which began August 21 and continued through August 24, 1979.

From information provided through discovery, plaintiffs introduced statistical summaries of transfers approved, broken

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[7] The Court erroneously referred to the school year 1978-79. The Court, of course, intended to refer to the school year 1979-80.

out by sending school, receiving school, and by race (Exh. 98). From this exhibit it appears that 326 white students have had transfers approved from Pearl to other high schools in the system. Sixteen blacks and twelve persons of other races were granted transfers from Pearl. All of the transfers from Pearl were subject matter based. The number of transfers from other non-comprehensive high school were:

	White	Black	Other
From Joelton	134	0	0
From Cohn	85	25	2
From Antioch	38	1	0
From DuPont Sr.	32	0	0
From Madison	31	3	0
From Goodlettsville	23	8	0

The impact of these transfers upon the racial mix at Pearl was dramatic. Children assigned to Pearl by applicable residential zones should have produced a racial mix of:

532 white (52%)
36 other (3%)
461 black (45%)

After the approved transfers were granted, the resulting totals and percentages were:

206 white (30%)
24 other (4%)
445 black (66%)

Additional transfer requests are pending from Pearl of 78 white, 17 black, and 4 other (Exh. 142). If these transfers are approved, the white population will be reduced to 22 percent.

The apparent mass exodus of white students from Pearl under the subject matter transfer raised a serious question in the

Court's mind as to the extent of monitoring which defendant Board had exercised in its implementation of the spirit if not the letter of the Court's enjoinder from the bench in July. From the statistical evidence above, the Court found a prima facie case of contempt to have been made and shifted the burden of going forward with the evidence to the defendants.

The School Board explained its procedure in implementing the Court's order as follows:

1. The School Board was informed at its July 10 meeting of the Court's order and the need for modification of the Board's policy.

2. The Board at its July 24 meeting rescinded its optional transfer policy. Dr. Elbert Brooks, Director, Metropolitan Schools, stated to the Board that "students who had made these automatic transfers would be assigned to their original zoned school but would be permitted to request a transfer in order to take a particular program/subject not offered at the student's assigned school."

3. A form letter was developed and signed by Dr. Brooks and sent to all students who for the school year 1978-79 had been assigned to a non-comprehensive high school but had opted to a comprehensive high school under the "automatic option" policy (Exh. 96).

4. A Transfer Committee was established consisting of Mr. Joe Garrett, Chairman, Pupil Accounting and Transfers, Pupil Personnel Services; Dr. Cornell Lane, Psychology, Pupil Personnel Services (a black member); Mr. Bill Hollingsworth, Attendance, Pupil Personnel Services; and Mr. Dan Covington, Vocational and Technical Education. A directive was issued by Dr. Brooks requiring that requests for transfer be forwarded to the office of Mr. Garrett for review by the Transfer Committee. After such review the two affected principals and the students were to be notified.

5. Principal Carnes of Pearl High testified he was informed at two meetings held with other principals and his district superintendent that his sole function was to determine if the requested course was available at his school and, if not, to sign off on the request. This instruction was reiterated by Dr. Brooks in a phone call after a school board member relayed parent complaints to Dr. Brooks about Mr. Carnes' handling of transfer requests. Somewhat inconsistently, the testimony also showed that Mr. Carnes understood and Dr. Brooks also reiterated to him his responsibility to counsel with the student and parents concerning such a transfer.

At some point after the transfers began to be requested, the form for such applications was changed. The material change was the deletion of an addendum which listed courses taken in the previous year, grades received, and courses desired this year. It also required a statement that the program of studies had been discussed with both the principal and guidance counselor and an explanation thereof. Finally, it required a selection of a course not offered at the assigned school and a statement of how the requested course would be beneficial to the student. No satisfactory explanation of the changes in the form was offered by defendants.

Notably after the fact, after the filing of the petition for contempt, Dr. Brooks required a comparison of the subject/program transfers granted with the students preregistration desires indicated last spring (Exh. 137). This comparison as it relates to transfers from Pearl reveals the following:

Transfer Requests for Programmatic Reasons Approved by Student Transfer Committee
Metropolitan Nashville Public Schools As of August 16, 1979

Spring Preregistration Course Selections Compared to Fall Registration Course Selection (Reasons for Transfer Request)

Sending School	Receiving School	Number Approved				Fall Course Selection Same As Spring Selection				Fall Course Selection Not Selected in Spring, But Spring Selection Not Offered at Sending School				Fall Course Selection Not Selected in Spring, Spring Selection Similar to Course Offered at Sending School				All Courses Selected in Spring Offered at Sending School				Number Spring Schedule Available
		B	W	O	T	B	W	O	T	B	W	O	T	B	W	O	T	B	W	O	T	
Pearl	Hillsboro	2	45	2	49	1	25	0	26	1	7	0	8	0	0	0	0	0	11	2	13	2
								(53.1%)				(16.3%)								(26.5%)		(4%)
										(69.4%)												
Seniors																						
Others	– 2																					
Black	– 0																					
White	– 9																					
Total	–11																					
	(22.4%)																					
Pearl	Hillwood	5	170	10	185	1	103	4	108	1	55	3	59	0	0	0	0	0	13	1	14	4
								(58.4%)				(31.9%)								(7.6%)		(2.2%)
										(90.3%)												
Seniors																						
Others	– 2																					
Black	– 0																					
White	–37																					
Total	–39																					
	(21.1%)																					
Pearl	Glencliff	1	94	0	95	0	42	0	42	0	34	0	34	0	1	0	1	1	10	0	11	7
								(44.2%)				(35.8%)				(1.1%)				(11.6%)		(7.4%)
										(80.0%)												
Seniors																						
Others	0																					
Black	0																					
White	19																					
Total	19																					
	(20.0%)																					

It is apparent from this summary that 69.4 percent of the transfers from Pearl to Hillsboro, 90.3 percent of the transfers from Pearl to Hillwood, and 80 percent of the transfers from Pearl to Glencliff were facially *bona fide* under the policy of the Board and the understanding of Dr. Brooks, discussed *infra*. In the case of the one white transfer from Pearl to Glencliff wherein the fall course selection was not selected in the spring, and the spring selection is similar to a course offered at the sending school, and in the case of those 38 transfers to comprehensive high schools in which all courses selected in the spring are offered at Pearl, the transfers are facially suspect.

Dr. Brooks testified that a follow-up interview will be scheduled with each of these individuals in the suspect category in an effort to determine the *bona fides* of the students' expressed desires. Such a monitoring is consonant with the policy adopted in 1977 by the Board in Section IV(F(4) of the Student transfer Policy ÷5119: "Special transfer requests having evidence of course or program selection and changes in courses scheduled for the purpose of *school reassignment* will not be approved" (emphasis added).

Dr. Brooks further testified that, in his opinion, there is no reliable way to explore the legitimacy of a subject/program transfer except after the fact. In pursuance of this belief, the chairman of the Transfer Committee developed a three-part monitoring plan, to which Dr. Brooks added a fourth, by which the Board will follow the progress of each transfer student in the requested courses (Exh. 139). Actual enrollment is to be verified and progress checked at six-week and semester intervals and evaluated for renewal of transfer.

The Board's actions before the filing of the contempt petition leaves much to be desired. Dr. Brooks admitted in hindsight that the comparison with spring course selection should have been examined before the fact rather than after. The Court believes that the use of the longer form, changed in midstream

apparently in the interest of time, would have produced information for a more objective evaluation of the *bona fide* nature of the application for transfer.

The statistical evidence of transfers of white students from Pearl gives rise to the inescapable inference that white students, given the opportunity to automatically opt out of the Pearl zone last year, certainly did not wish to return. Perhaps many of these represent legitimate desires to attend a comprehensive high school and take courses offered there but not at Pearl. Black children are not exercising this program/subject opportunity in nearly the equivalent numbers or percentages, however. This may be due in part to a corresponding desire by black students to attend a majority black school; it may be related to the ethnic pride of the black community in Pearl High as an institution. For whatever reason, it is a fact evidenced by the admitted statistics of both 1978-79 and 1979-80 transfers.

The Board has adopted, as a part of its long range plan of construction of comprehensive high schools, a plan to construct an inner city comprehensive high school, to be named Pearl, and at a location either on the present site or at some place in the North Nashville area. Originally, the Board had gone forward with the recommendation of the staff for the closure of Pearl, Cohn, and Joelton high schools upon the theory that none of these locations fit into the judicially imposed directive to locate comprehensive high schools in areas which would encourage and facilitate an integrated school system. Objections by the black community to the closure of Pearl brought about a reversal of this decision within the past year.

Another factor which has impinged upon the School Board's action in regard to Pearl, as well as other non-comprehensive high schools in the system, is the requirement by Tennessee law that all students in grades nine through twelve be given access to a comprehensive high school education by 1978 (T.C.A. §§ 49-2701 *et seq.*). As long as Pearl and other non-comprehensive high schools were either scheduled for closure or had not yet been converted to a comprehensive facility, the Board felt

obligated to provide the "automatic option," or at least the program/subject option on an "as required" basis.

The subject matter/program transfer plan was "loosely conceptualized and leniently administered." (Testimony of Dr. Scott). The Board of Education did not follow its own policies relating to subject matter transfers, specifically Sections IV(A) and IV(F) of the Student Transfer Policy } 5119. No preapproval screening was done to determine how the requested subject fit into a student's career objectives. No effort was made to ascertain if the requested subject correlated with the student's career objectives expressed at spring registration or if, in fact, any change had taken place in those career objectives by the fall registration. No guidance counseling input was sought or received before approval was granted. Transfer approval was automatic if the requested course was not offered at the sending school and if such course was not already full at the receiving school. No effort was made to tabulate course requests and to determine if a sufficient demand existed to establish the requested course as an offering at the sending school. For instance, in applications to transfer away from Pearl, there were at least 38 requests for horticulture, 18 requests for German history, 38 requests for media arts, 34 for computer programming, and 22 for vocational cluster. Such numbers would seem sufficient to establish classes in these subjects at Pearl. It would have been both feasible and reasonable to include a question on the request for transfer form inquiring whether or not the student would be willing to take the requested course at Pearl if it were offered there after a sufficient expression of interest. Such an inquiry was not made.

The looseness of the administration of the subject matter/program transfer policy and its pro forma approval can have no other effect than to emasculate any efforts at desegregation. Zoning becomes a farce under the expressed attitude of Dr. Brooks as to his understanding of a student's automatic right to course offerings at another school. Many of these

courses have no relationship whatsoever to the vocational program outlined in T.C.A. §§ 49-2701 *et seq.* As this Court reads that law, the variety of vocational offerings in the Metropolitan School System is not required to be duplicated at every school nor is every student required by this law to be given access to every course at every school.

[2] The Court finds that the school board policy for subject matter/program transfers, although racially neutral on its face, by the manner in which it has been implemented and the inherent potential for abuse in its conceptualization, has a negative impact upon the desegregation efforts of the School Board pursuant to the previously issued order of this Court, and violates the spirit of the 1971 order, and the spirit of the order of this Court issued orally on July 2, 1979.

[3] The Court, however, does not find defendants in contempt of the July 2, 1979, order of this Court. In that order, the Court directed defendants to abolish the optional transfer plan. It is indisputable that defendants complied with that order. In the July 2, 1979, order the Court did not deal specifically with the subject matter/program transfer plan, which was the central issue of the recent hearing. As the Court of Appeals for the Sixth Circuit has recently held, "The notice of a judicial order upon violation of which a contempt finding may properly be based is such notice as would clearly tell a reasonable person what he is required to do or abstain from doing." *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 749, 752, (6th Cir. 1979). It would violate due process to hold defendants herein in contempt for their implementation of the subject matter/program transfer plan when the Court did not address the matter with that degree of specificity necessary under the standard hereinabove set out.

[4] It is, therefore, ORDERED that:

1. The School Board reexamine and submit to this Court for approval by September 7, 1979, a revision of its subject mat-

ter/program transfer policy designed to provide methods by which transfer applications may be ogjectively judged prior to approval, to determine their validity in the educational objectives of the individual student, as opposed to a subterfuge on the part of a student to escape a given school or subvert the zones established for the purpose of achieving a unitary school system.

2. The School Board shall conduct a review of each of the transfer applications that have been heretofore approved as well as those now pending. Such a review will include an interview with both the student and parent or guardian. After such review, the Board will make written findings in each case of the validity of the request. A procedure will be established to obtain the recommendation of the principals from the sending and receiving schools and the judgment of the transfer committee. Such a procedure will also make provisions for an appeal to the Director. The decision of the Director, on appeal, shall be in writing and shall include the supporting reasons for his decision. Such a review of all previously granted requests will be made by September 7, 1979. The defendants will give first priority to reviewing those previously granted requests for transfers out of Pearl High School.

3. By September 7, 1979, the School Board shall submit to the Court for its approval recommendations relating to a plan to establish additional classes at Pearl and/or other non-comprehensive high schools when the number of requests for transfers from such sending schools are sufficient to justify the establishment of such classes. This order does not suggest or require the conversion of all high schools into comprehensive high schools. The Board will necessarily make value judgments between establishing courses such as computer sciences or vocational clusters, on the one hand, which may not be economically feasible to develop at, for example, Pearl, and establishing courses such as German history, horticulture, and guitar, which would not require mass expenditures if such courses were offered at Pearl.

4. Those students whose requests for transfer have been heretofore approved will register at and begin attending the school to which they requested to be transferred. The School Board shall reassign to the schools to which the students were originally zoned those students whose requests for transfer the transfer committee and/or the Director finds to be less than *bona fide* and reassign to the original zoned school those students who requested a course subsequently offered at that school, under paragraph three of this order.

5. Those students whose requests for transfer are pending and those students who have not yet requested transfer will register at and attend the school to which they were originally zoned until such time as the defendants evaluate their requests for transfer under the revised plan.

6. Pursuant to the order and memorandum, filed August 27, 1979, the defendant Board may grant the application of any senior (as defined in that memorandum opinion), who requests transfer from a high school to which he is zoned to the high school to which he attended as a junior in the year 1978-79.

The Court does not intend to alter the provision of the 1971 Court order, incorporated in Section XI of the Board's policy # 5119 (Exh. 21), that allowed students to transfer from "majority to minority" schools. Such provision has previously permitted a student, who is amember of the majority race in a particular school, to transfer automatically, without a program related reason, to the closest school in which that student would be a member of the minority race. The Court, however, will not condone transfers from, for example, Pearl, by white students in grades nine through eleven, when the effect of such a transfer will be to convert the majority at the sending schooi into a minority, or convert the minority at the receiving into a majority. The Board shall allow any student to transfer from a shcool in which he is *presently* in a majority to any school in which he would be *at that time* a member of a minority, in accordance with the defendants' previous majority to minority plan. If,

however, by the operation of the revised transfer plan and/or the majority to minority plan, the racial mix is altered so that a student in grades nine through eleven would not be transferring from a school in which he is presently a member of a majority to a school in which he would be at that time a member of a minority, the majority to minority rule will not justify approval of a request to transfer.

The Court recognizes that the foregoing directives are temporary and will be obviated by the completion of the comprehensive high school program.

MEMORANDUM

[5] Defendants have moved this Court to exclude those students who will be seniors in the year 1979-80 from the Court's order of August 24, 1979, relating to subject matter/program transfers. Plaintiffs have responded in opposition to defendants' motion.

In her affidavit attached to defendants' motion, Dr. Peggy Harris, research assistant for defendant Board of Education, states that the sixty-six white students, designated as seniors for the year 1979-80, have requested and been approved for transfer from Pearl to a comprehensive high school. This figure represents approximately 20 percent of the 326 white students in grades nine through twelve, originally zoned to Pearl, whose requests for transfers out of Pearl have been approved (Exh. 98). In addition, Dr. Harris stated that there were presently thirteen requests for transfer out of Pearl from white seniors whose applications were pending decision by defendant Board.

In defendants' motion, they note the testimony elicited at the recent hearing from Leslie Carnes, Principal of Pearl High School, and Dr. Elbert Brooks, Director of Metropolitan Schools, regarding the special status of seniors who may have bought senior rings and made plans to participate in athletic and extracurricular activities. Plaintiffs, however, point out that the

problems of seniors were not the subject of extensive proof at the hearings. They, therefore, argue that the special situation of each senior should be evaluated by the defendant Board on an individual basis when the Board reconsiders its prior grant of approval of transfer requests and initially considers pending transfer requests. Although plaintiffs contend that it is not equitable to permit those who have achieved a wrongfully acquired status to profit from such status, they also appear to be sensitive to the potential special needs and problems of seniors.

This Court has found that the previously utilized optional transfer plan and the Board's recent implementation of the subject matter/program transfer plan had a debilitating effect on desegregation efforts in this school system. Toward to the end of halting the rapid trend of reversion to an almost totally black inner city school, the Court ordered that the optional transfer plan be terminated and the method by which the program transfers were granted by radically revised so that program transfers could be based on *bona fide* educational reasons rather than on a means to escape a traditionally black, inner city school.

The Court has attempted to fashion a remedy that will eliminate the negative effects of the previous policies of defendant Board. In fashioning such a remedy, however, it is the Court's responsibility to balance the relative detriments and benefits to the school children, who will be affected by the Court's order. The Court cannot decree in a theoretical void; it must be cognizant of the specific situations involved and the harm that may befall individual children. The Court is not insensitive to the special status of high school seniors who have made plans according to the assumption that they would be attending the same school for their last year as they attended their junior year. Such plans may have entailed expenditure of money for class rings and senior pictures, and a commitment to particpate in, *inter alia*, athletic and band activities, school clubs, and student government. To destroy a student's plans

for the last year of high school and to wrest him away from the school he has known and the friendships he has developed has the potential for thwarting a child's academic and social adjustment and fulfillment of his educational goals. To uproot a child who has spent at least the last year in anticipation of completing his high school education in the same environment offends this Court's sense of justice. The potential harm in such upheaval weighs heavily in favor of an exclusion for seniors from the revised transfer plan.

The Court, therefore, grants defendants' motion to exclude seniors from the Court's order of August 24, 1979. The Court will permit the defendant Board to grant the application of any senior who requests transfer from a school to which he is zoned to the high school to which he attended as a junior in the year 1978-79. The Court adopts the definition of "senior" used by defendants as any student who, based on his number of credit hours, is capable of graduating from high school during the regular school year of 1979-80 plus the summer school term of 1980. An exemption for seniors will be incorporated into the final version of the Court's order of August 24, 1979. This order of exemption of seniors from the revised program transfer plan will be in effect only for the year 1979-80, and will not be extended beyond that year.

APPENDIX I

Exhibit B

AFFIDAVIT OF BILL WISE

With Exhibits 1 - 3

(Exhibit 4 Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Nos. 2094, 2956

Judge Wiseman

Robert W. Kelley, et al.

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.

v.

State of Tennessee; Lamar Alexander, Governor of the State of Tennessee; Robert L. McElrath, Commissioner of Education; and State Board of Education.

AFFIDAVIT OF BILL M. WISE

State of Tennessee

County of Davidson

The Affiant, Bill M. Wise, being first duly sworn, hereby deposes and says:

1. I am the Assistant Superintendent for Business and Facilities Services for the Metropolitan Nashville Public School System. I have held that position since 1983. Prior to 1983 I was Assistant Superintendent for Facilities and Services for the school system from 1971 to 1983.

2. My duties in these positions have involved the supervision of transportation, zoning, business and budget matters, and the school desegregation case, among other duties.

3. I have been intimately involved in the desegregation process in Nashville since prior to Judge Morton's desegregation order in 1971. Since that order, the school system has spent, *through 1982*, over $20,000,000.00 in transportation costs alone (including capital costs) for desegregation purposes. The annual recurring costs for the plan now in effect are approximately $6,000,000.00 (after the initial start-up year). These recurring costs include operating costs (not capital costs) and the current costs of the educational components.

4. Since mandatory busing for desegregation began in 1971, the school system and its students have suffered both financially and educationally from the added expenditures. Immediately after the 1971 order, a shortage of funds and buses required severely staggered opening and closing schedules for schools, beginning as early as 7:00 a.m. and as late as 10:00 a.m., and closing as early as 2:00 p.m. and as late as 4:30 p.m. For a short period we were able to improve slightly the schedules of elementary schools, but budget deficiencies have since forced a return to undesirable schedules.

5. The mere staggering of these schedules is an impediment to the educational experience for small children, especially since most alert and attentive hours are often exhausted before they arrive at school as late as 9:30. Further, some of these same children often arrive home after dark, a condition which, at minimum, concerns parents. Finally, the staggered opening and closing schedules are inconvenient for parents, especially for families with children of different ages or for families with working parents, and this inconvenience plus the educational detriment accompanying it fosters some loss of public support for the public schools.

6. Because desegregation must be considered a first priority fixed expense, it has an impact on other areas of educational services. Since 1971 we have essentially been proceeding on a status quo budget, deferring expenditures which cannot be deferred indefinitely. Some programs have been cut, other programs, including the educational components contained in the desegregation plan, can only be funded at a very minimum level. In 1982-1983, the Board of Education adopted a list of critical needs, attached hereto as Exhibit 1, only two of which needs have been funded. Some of these projects have been deferred for many years, including such things as air conditioning of schools (schools were closed for four days last year because of heat), adequate maintenance and repairs of school buildings and equipment, replacement of school equipment, and the like. While the Board has attempted to concentrate its budget cuts in the areas of facilities and equipment, such expenditures can be deferred for only so long before they have a detrimental effect on the educational environment.

7. In the middle 1970's, when changes in the state's transportation formula were being considered, the Board and staff approached legislative members and the Commissioner of Education to plead for recognition of systems like Nashville where mandatory desegregation costs were escalating. (See Exhibit 2). The formula was changed to Nashville's detriment, but the Davidson County delegation of the legislature was able to grandfather the system's current budget for five years of gradual cuts — T.C.A. §49-3-309(c). The grandfathering has expired, and the transportation reimbursement has been cut drastically. For example, in 1977-1978 before the formula changed, 39.30% of Metro's transportation budget was reimbursed. Meanwhile, the total expenditures for Metro in the area of transportation were increased, particularly with the Court's order of 1983-1984. None of these figures for reimbursement include sums for the purchase of buses, since the state formula does not provide a single dollar for purchase of school buses.

Neither does the state formula take into account time or distance on the bus, or actual costs of transportation in a school system.

8. In the last year for which state statistics are available (1982-1983), a comparison of the percentages of local transportation costs reimbursed by the state reveals that Metro's reimbursement is substantially lower than the vast majority of school systems around the State. In many of these school systems, the State provides over 40% of the local school system's costs, and in a significant number of cases the percentage is substantially higher. Meanwhile, in 1982-1983, only 15.22% of Metro's transportation costs were paid by the State.[1]

In my position, I am now, and have been since 1970, in charge of supervising the selection of new school sites in the construction of new schools. To my knowledge, all school sites and construction have been subject to approval by the Commissioner of Education, both before and after my tenure, pursuant to stringent rules and regulations imposed by the State Board of Education and enforced by the Commissioner.

10. Since the Court Order of 1971, I have received numerous complaints from parents and the public that the school system is in violation of T.C.A. §49-6-2101 which, as I understand it, prohibits the use of State funds for the purpose of achieving a racial balance or quota.

11. In the past two years or so, in my supervision of the desegregation case, T.C.A. §49-6-3005(c) has been used as a defense to the mandatory assignment plan under which we are now operating. (See Exhibit 4). In addition, the Board of Education has spent hundreds of hours in 1979 and 1980 hear-

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[1] The attached table was prepared under my supervision utilizing the 1982-1983 annual statistical report of the Department of Education. (Exhibit 3).

ing appeals of students denied transfer under the general procedural framework of T.C.A. §49-6-3201 in order to give them an opportunity for State mandated vocational education.

FURTHER THE AFFIANT SAITH NOT.

/s/ Bill M. Wise

Sworn to and subscribed before me
this 19th day of December, 1984.

/s/ Lynne E. Neeley
Notary Public

My Commission Expires: October 20, 1985

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
Transition Classes		
To provide transition classes after grades 3 to 6 (50 classes w/ratio of 1:20)	1,075,000	—0—
To provide summer transition classes after grades 3 to 6 (3 hour six-week program — 30 classes at 1:20)	45,000	—0—
Classroom Materials		
Increase allocation of supplies and materials by approximately 25 percent	186,000	—0—
Air-Conditioning		
To provide cooling in non-airconditioned classrooms, cafeterias, etc. by the use of central type mechanical equipment ($5,438,720)	92,000	543,872
Language Arts Teachers Grades 7 and 8		
To add 48 language arts teachers to staff 7th and 8th grade Fundamentals classes at 1:20	1,048,800	—0—
Opening-Closing Schedules		
To improve opening and closing schedules ($1,530,000)	312,000	153,000
Improve Maintenance		
To improve general building repair of schools	651,400	—0—

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
Language Arts Teachers 9-12		
To add 27 language arts teachers, decreasing high school Fundamentals classes to 20	581,175	—0—
Curriculum Development		
To continue curriculum development in the basic skills in grades 7-12	50,000	—0—
Pupil-Teacher Ratio		
To reduce the pupil/teacher ratio by an average of one in grades K-12	1,748,000	—0—
Librarians		
To employ three additional librarians in order to provide full-time service for every school with 300 students	65,500	—0—
Pupil Personnel Elementary		
To employ 26 Pupil Personnel specialists for grades K-6 to provide counseling, attendance, and social work service to students	645,840	—0—

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
Special Education Centers		
To begin the operation of a center for serious emotionally disturbed teenagers	482,500	—0—
To expand the dual diagnosis center's services to students who are severely handicapped	108,700	—0—
Community Education		
To employ six part-time program facilitators at satellite sites for the Community Education Programs at East/Warner, Glencliff, and McGavock, and to provide contingency funds to be used for classes (particularly in the inner-city schools) where enrollment is less than adequate to cover costs	15,000	—0—
To provide part-time clerical assistance for the East/Warner and Glencliff Community Education Centers	10,000	—0—
Gifted		
To increase the numbers of teachers in the gifted program from seven to ten to expand the special focus program to grades 7 and 8	72,621	—0—
Drug Education		
To expand the current School Team approach for the prevention of alcohol/drug use by the training of additional teams and the identification of a coordinator for the program	45,000	—0—

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
Counselors		
To employ 23 counselors to reduce the ratio in secondary schools to 1:300	571,320	
Testing		
To update and extend existing systemwide standardized testing by adopting new achievement tests for grades, K, 1, 2, 4,5 and 7	19,166	—0—
Computer Coordinator		
To employ a coordinator of computer assisted instruction, curriculum development, and management	35,000	—0—
Micro-computers		
To purchase micro-computers for use in grades 1-6	220,000	—0—
Pupil Personnel Services		
To expand related pupil personnel services and counseling for students as identified in IEP's (3) and to meet increased demands for testing (3)	156,727	—0—

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
Special Education		
To provide for additional special programs needed by current students; for new students in special programs and resource rooms; and allowing a reduction in the pupil-teacher ratio (18 teachers, 12 aides)	486,916	—0—
Librarians		
To provide a full-time librarian for each school having an enrollment of 300. (This position is in *addition* to the three presently listed in the Resource Planning Document)	22,996	—0—
Library Materials Clerks		
To provide eight additional library materials clerks for elementary schools with Southern Association deficiencies or with large enrollments	77,671	—0—
Summer Library Program		
To open ten elementary libraries one day per week for four weeks in summer of 1984 (Public Library to pay similar cost)	1,175	—0—
Participation in the Arts		
To expand the number of schools participating in NIA to the maximum for 1984-85	63,000	—0—

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
Replacement of Equipment		
To replace 300 typewriters in Business Education to begin a seven year cycle of replacement	195,000	—0—
School Aides		
To increase the aides available to school by providing additional funds to replace the lunchroom attendants with general aides for elementary and 5-6 middle schools. Schools having fewer than 200 students would be assigned an aide for one-half day (4 hours) and schools having more than 200 students would be assigned a full-time aide (7.5 hours). This aide would also serve as the lunchroom attendant for the appropriate number of hours per day and work in the school office, clinic, classrooms, etc., for the remaining hours of the assigned day	364,255	—0—
Classroom Supplies and Materials		
To increase appropriation for Materials in Lieu of Textbooks by 1) upgrading and replacement of kindergarten manipulatives, 2) availability of CCRP and MIP materials at no cost to local schools and 3) ancillary materials for adopted text (This request is in *addition* to the program listed in the Resource Planning Document)	78,806	—0—

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
School Equipment		
To replace worn-out typewriters and other office equipment such as duplicating machines to begin a ten year replacement program for school equipment. This level of funding would permit the replacement of wet copiers with dry copiers	86,478	—0—
Plant Maintenance		
To improve general repair of school buildings	200,000	—0—
To improve repair of grounds and outside utilities, including paving	500,000	—0—
Library Facilities		
To make modifications necessary to expand and improve libraries	300,000	—0—
Replacement of Worn-Out Furniture and Equipment		
Classroom furniture	323,000	—0—
Student lockers	115,200	—0—
Counselors		
To employ 20 full-time placement counselors (1:200 seniors) in the high schools	496,800	—0—

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
In-School Suspension Centers To replace substitutes with regular teachers in the In-School Suspension Centers (25 Centers)	546,250	—0—
Support Services To increase the support services for the students residing in group homes and/or Juvenile Court by the provision of two teachers plus part-time tutors	100,000	—0—
Driver Education To provide driver education instruction for high school students at the level of the program in 1980 (seven teachers)	222,550	—0—
Bilingual Program To continue present bilingual program using native language instructional aides	70,221	—0—
Systemwide Screening To facilitate the mandated systemwide developmental screening program in grades K-1, 3, 5 and 9 by providing personnel and equipment to test students	54,150	—0—

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
Data Processing To purchase a computer which will interface with the main-frame, allowing the Department of Research and Evaluation to better utilize and analyze test data and provide more data to schools	16,260	—0—
Micro-Computers To implement a pilot Home Economics program in Home Computer Usage	10,000	—0—
Computer Technicians To employ a computer technician to assist teachers in the use of micro-computers	24,000	—0—
Curriculum Materials To purchase special education curriculum materials for local school based programs (1984-85)	150,000	—0—
A V Technicians To employ three av/electronic technicians in 1984-85 and three additional ones in 1986-87 to operate and maintain equipment in the comprehensive high schools	45,000	—0—

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
Participation in the Arts		
To increase by 25% the system's contribution to the Cumberland Museum ($3,500), the Nashville Symphony ($3,000), and the Nashville Academy Theatre ($2,500)	9,000	—0—
Audio-Visual Equipment		
School audio-visual equipment	100,000	—0—
Vocational Equipment		
Vocational equipment originally purchased by the State	100,000	—0—
Office Equipment		
Office typewriters — Pupil Personnel Centers Elementary Program, school guidance offices	11,000	—0—
Pupil Personnel Equipment		
To purchase "call back" machine for use by the Attendance Department	5,000	—0—
Facility Equipment		
To purchase an elevator at Waverly Belmont to facilitate the movement of books and equipment	40,000	—0—

CRITICAL PROGRAM AND CAPITAL NEEDS

	OPERATION	DEBT SERVICE FOR CAPITAL
Replacement of Worn-Out Equipment		
Transportation shop trucks, wreckers, etc.	158,500	—0—
Warehouse equipment	16,000	—0—
Microfilming equipment	7,150	—0—
Bookbindery equipment	4,810	—0—
Radios for School Buses		
To add 50 two-way radios to school buses	50,000	—0—
Contingency Fund		
A 2% contingency fund to be expended for unanticipated increases that occur after the final budget adoption	3,472,640	—0—

Exhibit 2

METROPOLITAN PUBLIC SCHOOLS
2601 Bransford Avenue
Nashville, Tenn. 37204

March 10, 1977

The Honorable John Hicks
Suite 5
Legislative Plaza
Nashville, Tennessee 37219

Dear Senator Hicks:

I am pleased to know of your interest in the proposed formula now under consideration for distribution of State pupil transportation funds and the resulting loss to Davidson County. As you observed, this school district stands to lose over $644,000.00 annually if the new formula is adopted.

The budget for pupil transportation in Davidson County for the School Year 1976-77 is $4,866,320.00. Of this amount the State has heretofore reimbursed the local district at a rate of approximately thirty-two (32) percent or approximately $1,604,177.00. If the new formula is passed, the amount received from the State will be reduced to approximately $960,000.00 which will represent only about nineteen (19) percent of the annual cost for transporting school children in Davidson County.

When we learned that a new formula was being considered, we expressed our concern to Commissioner Ingram and his staff for the negative impact on this school district. Among our major concerns are: (1) the failure of the formula to recognize the primary cost features of a pupil transportation service such as actual *distance* travelled and *time* required to deliver children to their assigned schools, and (2) the absence of any consideration for cost related to transporting children in accordance with Federal Court Orders which, in our case, prevent the assignment of children to "neighborhood" schools.

We agree that the total number of children transported is a valid consideration; however, the amount to be reimbursed per capita and the relative weight of the per capita feature of the formula tends to negate its effectiveness. Furthermore, we see no true and consistent cost relationship between the cost of pupil transportation and the geographic size of a county. Again, we contend *distance travelled, time required for delivering* students, and *actual number of students* transported are far more realistic cost factors.

The loss of $644,000.00 in State reimbursement for transportation would have a serious impact on the local school budget and will jeopardize the district's ability to provide transportation at the present level of service. We are encouraged by the Commissioner's interest and concern for the problem the new formula poses for Davidson County and are hopeful that some steps can be taken to reduce the budgetary impact of the proposed legislation.

Again, I am grateful for your expressed interest in this matter and appreciate the information received with your letter.

Sincerely,

/s/ Elbert D. Brooks

EDB/jj

c c : Dr. Sam Ingram, Commissioner of Education
Mayor Richard Fulton, Metropolitan Government
Mr. John Reed, Legislative Liaison Metropolitan Government
Senator Bill Boner
Senator Douglas Henry, Jr.
Senator Avon Williams
Representative John Steinhauer
Representative James R. McKinney
Representative Charles R. Robinson
Representative E. Marvin Fleming

Representative Victor Ellis
Representative Harold Love
Representative Mike Murphy
Representative Stephen Cobb
Representative John Chiles, Jr.
Representative Charles Pruitt
Representative Richard Clark
Representative Elliott Ozment
Representative Clarence Phillips
Councilman Tandy Wilson
Dr. Bill Wise, Assistant Superintendent
Members of Metropolitan Board of Education

COMPARISON OF STATE TRANSPORTATION ALLOCATION TO TOTAL LOCAL COSTS

System	Total Transportation Budget	State Transportation Allocation	State % Local Costs
Anderson Co.	1,373,596.34	191,400.89	13.934%
Clinton	1,899.00	0.00	0.000%
Oak Ridge	401,213.75	0.00	0.000%
Bedford Co.	429,812.08	162,281.05	37.756%
Benton Co.	341,849.14	127,488.10	37.294%
Bledsoe Co.	243,607.48	101,623.49	41.716%
Blount Co.	1,217,911.87	276,360.78	22.691%
Alcoa	20,988.99	0.00	0.000%
Maryville	145,857.85	39,443.63	27.043%
Bradley Co.	936,819.50	176,823.28	18.550%
Cleveland	190,977.32	54,091.33	28.323%
Campbell Co.	745,579.16	206,217.20	27.659%
Cannon Co.	224,942.84	75,575.55	33.607%
Carroll Co.	530,811.18	193,391.15	36.433%
H Rock Bruceton	0.00	0.00	0.000%
Huntingdon	427.00	0.00	0.000%
McKenzie	0.00	0.00	0.000%
So. Carroll	6,676.45	0.00	0.000%
West Carroll	0.00	0.00	0.000%
Carter Co.	649,069.06	185,255.62	28.542%
Elizabethton	79,662.14	25,239.84	31.684%
Cheatham Co.	415,322.42	136,399.07	32.842%
Chester Co.	233,976.18	93,630.24	40.017%
Claiborne Co.	604,484.40	190,346.72	31.489%
Clay Co.	205,808.75	74,051.48	35.981%
Cooke Co.	671,222.34	163,436.49	24.349%
Newport	0.00	0.00	0.000%
Coffee Co.	437,936.17	135,966.00	31.047%
Manchester	1,185.64	0.00	0.000%
Tullahoma	5,312.30	0.00	0.000%
Crockett Co.	31,967.04	15,298.09	47.850%
Alamo	20,781.97	10,180.99	48.990%

System	Total Transportation Budget	State Transportation Allocation	State % Local Costs
Bells	18,561.91	8,656.30	48.635%
Crockett Mills	22,956.09	11,627.31	50.650%
Friendship	13,578.10	6,197.12	45.641%
Gadsen	22,192.00	16,427.31	74.024%
Maury City	24,255.62	15,296.09	63.062%
Cumberland Co.	570,055.77	218,148.35	38.268%
Davidson Co.	6,307,291.29	960,000.00	15.220%
Decatur Co.	259,475.00	99,225.61	38.241%
Dekalb Co.	274,088.62	103,077.45	37.607%
Dickson Co.	632,942.55	189,064.13	29.871%
Dyer Co.	436,179.11	147,338.56	33.779%
Dyersburg	30,699.47	0.00	0.000%
Fayette Co.	652,568.05	214,436.03	32.860%
Fentress Co.	296,958.56	144,650.93	48.711%
Franklin Co.	566,795.90	204,336.56	36.051%
Gibson Co.	0.00	0.00	0.000%
Humboldt	62,908.94	42,533.01	67.610%
Milan	90,518.36	48,065.23	53.100%
Trenton	196,945.29	34,764.98	17.652%
Bradford	54,270.83	20,499.04	37.772%
Gibson Sp.	205,649.93	65,316.04	31.761%
Giles Co.	622,580.81	168,868.09	27.124%
Grainger Co.	497,729.89	122,560.42	24.624%
Greene Co.	691,893.75	250,494.53	36.204%
Greenville	131,542.37	53,411.56	40.604%
Grundy Co.	188,335.73	105,245.96	55.082%
Hamblen Co.	438,234.81	140,234.02	32.000%
Morristown	205,860.71	37,600.85	18.265%
Hamilton Co.	2,034,523.96	317,687.97	15.600%
Chattanooga	1,571,253.33	378,177.00	24.068%
Hancock Co.	181,734.08	67,046.11	36.892%
Hardeman Co.	481,054.22	201,314.26	41.849%
Hardin Co.	448,621.68	176,074.78	39.248%
Hawkins Co.	763,408.28	246,047.87	32.230%
Rogersville	12,834.70	0.00	0.000%

System	Total Transportation Budget	State Transportation Allocation	State % Local Costs
Haywood Co.	384,951.08	168,273.36	43.713%
Henderson Co.	482,212.07	152,565.01	31.639%
Lexington	0.00	0.00	0.000%
Henry Co.	512,814.81	153,051.03	29.845%
Paris	49,023.05	30,870.80	62.972%
Hickman Co.	411,650.14	159,148.95	38.661%
Houston Co.	128,282.30	61,655.65	48.062%
Humpherys Co.	347,986.65	156,640.55	45.013%
Jackson Co.	247,227.31	87,299.22	35.311%
Jefferson Co.	508,537.76	179,351.86	35.268%
Johnson Co.	348,289.56	104,397.14	29.974%
Knox Co.	4,015,120.00	794,871.00	19.797%
Knoxville	253,675.82	0.00	0.000%
Lake Co.	105,972.90	48,398.88	45.671%
Lauderdale Co.	317,596.92	180,352.82	56.787%
Lawrence Co.	570,005.50	207,106.67	36.334%
Lewis Co.	133,139.84	84,218.00	63.255%
Lincoln Co.	545,206.57	164,900.83	30.246%
Fayetteville	34,837.38	12,421.61	35.656%
Loudon Co.	456,306.51	107,697.65	23.602%
Lenoir City	55,055.21	15,242.12	27.685%
McMinn Co.	578,053.37	177,101.71	30.638%
Athens	54,706.52	23,786.71	43.481%
Etowah	16,165.17	5,570.73	34.461%
McNairy Co.	442,738.88	182,825.10	41.294%
Macon Co.	390,780.61	112,146.73	28.698%
Madison Co.	719,338.72	227,785.06	31.666%
Jackson	76,983.48	25,178.42	32.704%
Marion Co.	631,318.20	162,428.43	25.728%
Richard City	0.00	0.00	0.000%
Marshall Co.	365,385.34	115,953.91	31.735%
Maury Co.	683,189.29	230,530.15	33.743%
Meigs Co.	151,954.42	69,562.60	45.779%
Monroe Co.	707,473.91	206,796.24	29.230%
Sweetwater	4,618.21	0.00	0.000%

System	Total Transportation Budget	State Transportation Allocation	State % Local Costs
Montgomery Co.	1,181,457.04	352,159.50	29.800%
Moore Co.	127,105.58	37,740.88	29.693%
Morgan Co.	382,060.39	156,808.40	40.998%
Obion Co.	482,210.29	165,143.63	34.247%
Union City	0.00	0.00	0.000%
Overton Co.	382,180.44	141,490.04	37.022%
Perry Co.	163,578.46	91,544.71	55.964%
Pickett Co.	109,703.64	46,798.48	42.659%
Polk Co.	349,221.49	132,401.75	37.913%
Putnam Co.	597,167.03	169,590.66	28.399%
Rhea Co.	363,482.13	130,147.80	35.806%
Dayton	994.50	0.00	0.000%
Roane Co.	661,939.24	205,012.09	30.971%
Harriman	516.75	0.00	0.000%
Robertson Co.	533,506.75	194,567.98	36.470%
Rutherford Co.	1,698,768.58	341,682.12	20.114%
Murfreesboro	97,214.31	37,359.09	38.430%
Scott Co.	449,671.94	167,162.62	37.174%
Oneida	0.00	0.00	0.000%
Sequatchie Co.	221,649.34	82,281.69	37.122%
Sevier Co.	778,574.29	253,014.98	32.497%
Shelby Co.	2,060,144.34	375,012.15	18.203%
Memphis	5,643,532.29	685,029.81	12.138%
Smith Co.	310,686.30	106,526.18	34.287%
Stewart Co.	244,924.66	115,701.25	47.240%
Sullivan Co.	2,318,306.27	376,081.55	16.222%
Bristol	30,017.90	0.00	0.000%
Kingsport	296,954.11	49,743.87	16.751%
Sumner Co.	1,510,289.26	352,988.58	23.372%
Tipton Co.	513,766.76	180,915.05	35.213%
Covington	12,193.20	11,119.79	91.197%
Trousdale Co.	120,879.42	41,084.02	33.988%
Unicoi Co.	182,693.61	70,907.71	38.812%
Union Co.	326,929.96	88,559.71	27.088%
Van Buren Co.	94,177.21	62,749.76	66.629%

System	Total Transportation Budget	State Transportation Allocation	State % Local Costs
Warren Co.	505,206.81	173,742.02	34.390%
Washington Co.	872,952.85	219,279.82	25.119%
Johnson City	131,095.97	59,793.69	45.611%
Wayne Co	391,208.83	181,005.15	46.493%
Weakley Co.	469,523.46	174,635.53	37.194%
White Co.	361,416.08	133,181.14	36.850%
Williamson Co.	1,086,107.04	251,573.12	23.163%
Franklin	0.00	0.00	0.000%
Wilson Co.	848,900.19	262,178.14	30.884%
Lebanon	73,143.75	0.00	0.000%
Total	$70,894,848.03	$18,530,991.80	26.139%

(3)

Supreme Court, U.S.
FILED
MAY 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1774

In The

Supreme Court of the United States

October Term, 1987

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METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,

Petitioners,

vs.

STATE OF TENNESSEE, et al.,

Respondents.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment bars the district court from ordering that funds be expended from the treasury of the state of Tennessee to indemnify the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, for 60% of the desegregation costs for its public school system?

2. If not, then whether such relief would be an inappropriate exercise of federal equity jurisdiction and an impermissible intrusion upon state legislative authority?

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No. 87-1774

In The

Supreme Court of the United States

October Term, 1987

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,

Petitioners,

vs.

STATE OF TENNESSEE, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 836 F.2d 986 (6th Cir. 1987) (Petition to rehear and for rehearing *en banc* was denied on March 15, 1988).

STATEMENT OF THE CASE

This third-party action involves an attempt by a local governmental unit, the Metropolitan Board of Nashville and Davidson County, Tennesee (Metro), to have its sovereign, the State of Tennessee, indemnify it for a portion of the costs of court-ordered desegregation of Metro's schools. This is not a desegregation action in which victims of segregation seek relief. Rather, it is an attempt by a judicially-determined constitutional wrongdoer to escape the full burden of its actions and to shift a portion of that burden to the State, despite the bar presented by the Eleventh Amendment, and despite the limitations on the reasonable exercise of federal court equity jurisdiction.

A. The Indemnification Action (*Metro v. State—1981 to Present*)

The petition arises from a third-party action[1] brought by Metro against the State of Tennessee, the State Board of Education and certain state officials (State)[2]. This indemnification action is an action for money to fund a

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[1]For covenience and clarity, the third-party action *(Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al. v. State of Tennessee, et al.)* which is the basis of the petition will be referred to as the "indemnification action." The original litigation *(Kelley, et al. v. Metropolitan County Board of Education, et al.)* will be referred to as the "desegregation action."

[2]Pursuant to Rule 40.3 of the Supreme Court Rules Ned Ray McWherter has been substituted for Lamar Alexander as Governor of Tennessee, Charles E. Smith has been substituted for Robert L. McElrath as Commissioner of Education, and Sam Kennedy, Sr. and Robert Byrd have been substituted for Frank Gorrell and Judge Paul Summers as members of the State Board of Education sued in their official capacities.

portion[3] of the relief Metro has been ordered to provide to victims of segregation in the desegregation action, *Kelley v. Metropolitan Board of Education*, 687 F.2d 814 (6th Cir. 1982).

On March 26, 1981, Metro (the defendant in the then 26 year old lawsuit involving desegregation of Metro's schools), filed a third-party complaint against the State seeking to have the State bear the cost of school desegregation in Nashville and Davidson County over and above the general support for its educational system which Metro already receives from the State. (Appendix, A-17).

The State filed a motion to vacate the order making the state defendants parties on June 1, 1981. On March 9, 1983, the district court denied the State's motion to vacate. (Appendix A-27). Both Metro and the State filed motions for summary judgment. On August 14, 1985, the district court entered an order requiring the State to pay 60% of the costs of Metro's desegregation program from the date the third-party complaint was filed. *Kelley v. Metropolitan Board of Education*, 615 F.Supp. 1139 (M.D. Tenn. 1985).

On appeal by the State, the Court of Appeals for the Sixth Circuit reversed the district court and ordered that judgment be entered in favor of the State. The court held that in this contest "about money", the Eleventh Amendment barred the indemnification action by Metro, a politi-

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[3]In fact, the third-party complaint, as amended, asks that the State "indemnify" Metro for *all* costs and expenses incurred by Metro as a result of the *Kelley* litigation, including costs of the remedies ordered. (Appendix, A-5).

cal subdivision of the State, against the State. The court further held that equitable considerations compel caution in judicial interference in policy and political decisions on how the costs of desegregation are distributed between a state and one of its own subdivisions.

B. The Desegregation Action (*Kelley v. Metro—1955 to Present*)

After this Court's decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*) and *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), on June 16, 1955 then Tennessee Attorney General George McCanless issued an opinion letter to the Tennessee Commissioner of Education which stated that, under Tennessee law, the timing, method, and implementation of school desegregation was the responsibility of local school districts who must apply the law to the unique circumstances of their own situations. This letter formed the basis of the State's policy on desegregation of public education.[4]

On September 23, 1955, the desegregation action was filed against the Nashville City Board of Education by a group of black school children and their parents. No State defendants were named. On October 5, 1956, the Tennessee Supreme Court rendered its opinion in *Roy v. Brittain*, 201 Tenn. 140, 297 S.W.2d 72 (1956), holding that all state statutes mandating segregated public education (and, by necessary implication, the underlying State con-

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[4]The Sixth Circuit noted that the policy of the State of Tennessee to let local school systems "pull the laboring oar in attempting to eliminate the consequences of segregation" was not an evasion of state responsibility. *Kelley*, 836 F.2d at 994. The letter is quoted extensively in *Kelley v. Metropolitan Board*, 615 F.Supp. 1139, 1143 (M.D. Tenn. 1985).

stitutional provision as well) were invalid and must yield to the principles enunciated in *Brown*.[5] *Id.* at 144.

On January 21, 1957, the district court approved a plan submitted by the City Board for desegregation of Nashville's first grade and ordered a plan for complete desegregation to be submitted by December 31, 1957. The Board submitted a plan grounded on the Parental Preference Statute which had been declared unconstitutional by the district court on September 1, 1957, despite a warning by the court not to do so. The plan was disapproved in *Kelley v. Board of Education*, 157 F.Supp. 272 (M.D. Tenn. 1958).

In June of 1958, the district court approved a plan calling for elimination of compulsory segregation in the second grade as of academic years 1958-59, and in one additional grade per year thereafter. *Kelley v. Board of Education*, 3 Race Rel. L. Rptr. 651 (M.D. Tenn. 1958) *aff'd*, 270 F.2d 209, *cert. denied* 361 U.S. 924 (1959). Suit was filed to desegregate the Davidson County public schools on December 19, 1960. Again, there were no State defendants named. On September 10, 1963, after adoption of metropolitan government for Nashville and Davidson County, the city and county cases were consolidated by consent.

In 1971, the district court, because of Metro's "apparently half hearted efforts to devise a unitary school sys-

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[5]Again, the Sixth Circuit noted the Tennessee Supreme Court's decision, and the fact that the system of *de jure* segregation was completely dismantled in the 1960s. The court specifically found that the "state's duty in this respect was discharged long before Metro filed its third-party complaint against the State." *Kelley*, 836 F.2d at 994.

tem that would encourage integration," implemented a wide ranging plan, including busing for desegregation purposes. *See Kelley v. Metropolitan Board of Education*, 492 F.Supp. 167, 171 (M.D. Tenn. 1980).[6] In August, 1972, the district court issued a memorandum finding that Metro had not made a good faith effort to comply with the court ordered integration plan. After a hearing, the court noted the "consistent refusal of the school board and the City Council to provide an adequate number of school buses to implement effectively the plan of this Court. There is ample evidence that they are capable of doing so." In effect, concluded the court, Metro had "endeavored to accomplish indirectly what [they] cannot permissibly accomplish directly—the frustration of this Court's plan to establish a racially integrated school system." (Appendix, A-41).

In 1979, the district court, after hearings, ordered that Metro devise and submit to the court a new plan for desegregation that would, among other things, involve the entire metropolitan county. The district court held extensive hearings on plans submitted by the parties, beginning March 3, 1980 and ending May 1, 1980. In an order dated May 20, 1980, the district court rejected plans presented and ordered Metro to submit a new plan and gave specific directives based upon the court's analysis of the specific burdens and benefits emanating from the "*Swann*-type remedy" ordered by the court in 1971. (Petitioner's Appendix, A-122, 166).

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[6]Subsequently, the Court of Appeals for the Sixth Circuit found that the Metropolitan School Board had not acted in good faith and had implemented the 1971 plan in a manner that actually prevented effective desegregation. *Kelley v. Metropolitan Board of Education*, 687 F.2d 814 (6th Cir. 1982).

The Board filed its new plan on January 19, 1981. The district court entered an order approving the Board's plan on April 17, 1981. This order was clearly based upon the hearings held prior to the May 20, 1980 order.[7]

The plaintiffs appealed to the court of appeals, which by opinion dated July 27, 1982, affirmed in part and reversed in part. In that proceeding before the Sixth Circuit, the State was not included as a party. *Kelley v. Metropolitan Board of Education,* 687 F.2d 814 (6th Cir. 1982). On June 1, 1983, the district court, considering the case on remand, entered an order and memorandum approving a new plan submitted by the Board and agreed to by the plaintiffs.

C. The Court of Appeals' Decision (*Metro v. State*)

The court of appeals' decision which Metro seeks to have reviewed is based upon the unique factual situation and procedural posture of this case.

The court pointed out that this third party action does not involve the rights of plaintiffs suing for relief from the effects of segregation and that those plaintiffs are receiving full relief. *Kelley,* 836 F.2d at 989-990. The court correctly framed the issue presented, stating "the contest between Metro and the State of Tennessee is a contest not about desegregation, but about money." *Kelley,* 836 F.2d at 990.

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[7]In its memorandum opinion denying the State's motion to vacate the order joining the State defendants, the district court stated that the original order making State defendants parties "did not provide State defendants a meaningful opportunity to participate in the 1981 hearings." (Appendix A-30).

In its analysis of Eleventh Amendment principles and the "prospective compliance exception" in this case, the court once again recognized the unique situation presented. It found three things: (1) the State "participation" ordered by the district court consisted solely of financial participation; (2) the order to pay money was ancillary to no other affirmative relief; and (3) the State officials were not currently doing anything wrong. *Kelley,* 836 F.2d at 990-991. In addition, the court held that the district court's finding, coming 30 years after the institution of the desegregation lawsuit, that the State "is a 'constitutional wrongdoer' ", is not supported by the record. *Kelley,* 836 F.2d at 995.

The court further examined the role of federal courts, exercising their equitable jurisdiction, in disputes over money between a state and one of its political subdivisions. Again, the court's examination was grounded in the particular situation presented. The court particularly noted that Metro had failed to assert any claim against the State until "a decade after busing was ordered and a quarter of a century after this lawsuit was begun." *Kelley,* 836 F.2d at 1000. The court recognized the authority of federal courts to order integration, but also recognized the authority of the Tennessee legislature to determine how costs of desegregation, as well as other costs of education, should be funded. *Kelley,* 836 F.2d at 995-996.

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REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' DECISION IN THIS INDEMNIFICATION ACTION THAT THE ELEVENTH AMENDMENT BARS METRO'S RECOVERY OF 60% OF ITS DESEGREGATION COSTS FROM THE STATE IS CONSISTENT WITH THE PRECEDENTS OF THIS COURT

The Eleventh Amendment provides that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." This constitutional provision bars actions against States for the recovery of money; however, Metro argues that the prospective compliance exception to the Eleventh Amendment[8] "has been utilized regularly in desegregation cases" and should not prohibit the monetary relief awarded by the district court in this case. Petition for Writ of Certiorari, p. 17 (Petition). This position ignores a line of decisions of this Court which limits the breadth of the prospective compliance exception[9] and misinterprets the holding of this Court in *Milliken v. Bradley*, 433 U.S. 267 (1977).

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[8]The prospective compliance exception to the Eleventh Amendment was first enunciated by this Court in *Ex Parte Young*, 209 U.S. 123 (1908) in which this Court held that the Attorney General of Minnesota was enjoined from enforcing a statute inconsistent with the Fourteenth Amendment.

[9]Metro notes that the court of appeals "relies upon a number of cases which do not involve desegregation remedies nor the concept of continuing constitutional violation." Petition, p. 18.

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In *Edelman v. Jordan*, 415 U.S. 651 (1974), Chief Justice Rehnquist rejected the argument that the Eleventh Amendment did not bar relief in the form of equitable restitution instead of money damages:

> We do not read *Ex Parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature.

Id. at 666. *See also Papasan v. Allain*, 106 S.Ct. 2932 at 2941 (1986) (In determining whether particular relief is barred by the Eleventh Amendment, the court will "look to the substance rather than the form of the relief sought.") In the present case, the fact that the district court fashioned the relief in equitable form is irrelevant when the substance of the entire relief against the State was indemnification of 60% of the costs of desegregation to Metro.[10] Such relief is clearly barred by the Eleventh Amendment.

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The fact that the original action against Metro is a desegregation case does not render the decisions of this Court relied upon by the court of appeals to be inapplicable. Where the relief afforded against the State is solely the payment of money, such a remedy is barred by the Eleventh Amendment unless the State has waived its sovereign immunity or Congress has expressly abrogated that immunity through the Fourteenth Amendment. *Welch v. Texas Department of Highways and Public Transportation*, 107 S.Ct. 29, 41 (1987). There is no dispute that the State of Tennessee has not waived its immunity nor is there any congressional enactment abrogating that immunity in this case.

[10]As the Sixth Circuit stated "the 'participation' mandated by the district court's order is purely financial; the officials will not

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Likewise, in *Green v. Mansour*, 474 U.S. 64 (1985) this Court stated that although "[r]emedies designed to end a continuing violation of Federal law are necessary to vindicate the Federal interest in assuring the supremacy of that law, . . . compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." [citation omitted] *Id.* at 68. Contrary to Metro's argument, the relief requested against the State is compensatory in nature. Metro seeks to be indemnified by the State for its alleged past wrongdoing with respect to the desegregation of the Nashville public schools. (Appendix, A-14-15). The plaintiffs in the desegregation action have obtained complete relief.[11] The relief afforded by

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be in contempt of the court's order if they pay 60% of Metro's desegregation costs out of the state treasury, and they will be in contempt if they fail to do so." *Kelley*, 836 F.2d at 990.

[11]In this respect, the court of appeals stated the following:

> It bears emphasis that we are not here called upon to adjudicate the right of plaintiffs' suing to obtain the equal education opportunities promised them in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Those plaintiffs have long since won their case. They won it without ever having asserted a claim against the State. They are already receiving—through decrees that do no violence to the principle of sovereign immunity—the full measure of relief to which they are entitled under the constitution.
>
> The issue before us is not whether the children in Metro's schools will receive the benefits of the enhanced educational program that the district court ordered Metro to develop and implement . . . Metro makes no claim . . . that it is incapable of complying with educational components of the plan. Similarly,

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the district court in this indemnification action is granted solely to Metro not the plaintiffs in the desegregation action. Since the plaintiffs have been afforded total relief in the desegregation action, no further relief is necessary to enforce their constitutional rights. Thus, the district court's order that the State indemnify Metro for 60% of its costs incurred for desegregation is compensatory in nature and barred by the Eleventh Amendment.

As for this Court's decision in *Milliken*, the relief afforded against the State of Michigan was the requirement that "the Detroit Board and the State put into effect certain comprehensive programs which were found to be essential to the success of the desegregation effort." *Milliken v. Bradley*, 540 F.2d 229, 240 (6th Cir. 1976). The result of the order in the *Milliken* case was to require the State of Michigan to conform its conduct to the constitution by removing vestiges of segregation through the in-

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> the issue is not whether the school children will be transported in accordance with the mandatory busing plan, which, as modified several years ago to meet the requirements of this Court, has been in effect for more than a decade and a half. That busing plan, we are told, has been fully implemented.

Kelley, 836 F.2d at 989-990. Even Metro admits that it is "minimally" funding the desegregation plan ordered by the court of appeals but complains that it has had to curtail educational programs to do so. Petition, p. 20. Metro's funding concerns could be remedied at the local level by increasing revenues through alternatives such as tax rate adjustments, Tenn. Code Ann. § 49-3-315 (Supp. 1987) (Appendix A-1), or by using funds not now earmarked for educational programs. However, instead of accepting responsibilitiy for the cost of desegregation, Metro seeks to spread the cost of the desegregation of its schools upon all the taxpayers of the State by demanding reimbursement of its desegregation costs from the State.

stitution of specific programs which had the ancillary effect of additional expenditure of State funds.

Metro asserts that the State of Michigan was no more than a "recalcitrant financial participant" in the desegregation program. Petition, p. 19, fn. 16. This argument ignores the fact that the State of Michigan was an original defendant in the *Milliken* case when it was filed in 1970 and was required to do more than pay a portion of the desegregation costs. For example, of the four educational components of the desegregation plan for the City of Detroit, this Court noted that "the Detroit Board and the State Department of Education [were ordered] to institute a testing program along the lines proposed by the local school board in its original desegregation plan." *Milliken,* 433 U.S. at 276. In the case at bar, the State was not a defendant to the original desegregation action filed against Metro and was brought into this case as a third-party defendant by Metro more than 25 years after the original action was filed. More importantly, the only relief afforded against the State by the district court was the payment of money which is barred by the Eleventh Amendment.[12]

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[12]This Court stated in the *Edelman* case that "we must judge the award actually made in this case, and not one which might have been differently tailored in a different case . . ." *Edelman v. Jordan,* 415 U.S. at 665. In 1981, well into the remedial stages of this litigation, Metro sued the State as a third-party defendant to indemnify Metro for its costs of desegregation. Metro is bound by those facts and barred by the Eleventh Amendment from any recovery.

II.

THE HOLDING OF THE SIXTH CIRCUIT IN THIS THIRD-PARTY ACTION FOR INDEMNIFICATION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS IN DESEGREGATION CASES.

Decisions of the Seventh and Eighth Circuits cited by Metro are distinguishable from its present idemnification action to obtain after-the-fact funding from the State for its own court-ordered desegregation plans. *See Jenkins v. State of Missouri*, 807 F.2d 657 (8th Cir. 1986); *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 292 (1986); *Liddell v. Board of Education of the City of St. Louis*, 667 F.2d 643 (8th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1982); *United States v. Board of School Commissioners of the City of Indianapolis*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1986 (1982).

Typically, the cited cases represent the efforts of individual victims of discrimination or their representatives to have remedial plans instituted in school systems where the vestiges of racial segregation had been wholly ignored or actively perpetuated by local and state governments for decades after this Court's decision in *Brown I*. In the face of timely claims for immediate injunctive relief by actual victims, application of the prospective compliance exception to Eleventh Amendment immunity was hardly at issue.[13]

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[13]In cases where victim-plaintiffs fit easily into the *Milliken* framework, lower court opinions devoted little or no attention to analysis of the Eleventh Amendment. However, a local school

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This action has been aptly characterized by the court of appeals as "essentially a suit for the recovery of money from the State" by one of its political subdivisions. *Kelley*, 836 F.2d at 989. Cast in such a light, it is apparent that the issue of prospective relief for victims of discrimination is not the subject of this indemnification action. Because the issues in the cited desegregation cases are different from those in this indemnification action, there is no conflict among the circuits.

Further distinguishing this indemnification action from the cited Seventh and Eighth circuit cases is Metro's status in this litigation. Metro, an adjudicated constitutional wrongdoer, has belatedly attempted to dodge court imposed financial responsibility for its own desegregation plans by "stepping into the shoes" of victims and pointing a finger at the state, a non-party to the desegregation action.[14] The court of appeals correctly determined that

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district plaintiff attempting to recover from the State was not so automatically presumed to fit within the prospective relief exception. In the initial stages of the *Little Rock* case, where a school district was the sole plaintiff, the district court dismissed the State as a defendant stating "The motion to dismiss the State of Arkansas must of course be granted. Injunctive relief could not be awarded the plaintiff against the state absent its consent to be sued. *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978)", *Little Rock School District v. Pulaski County Special School District No. 1*, 560 F.Supp. 876 (E.D. Ark. 1983).

[14]Metro's self-serving statements regarding "stepping into the shoes" of the original *Kelley* plaintiffs, are an attempt to avoid long settled doctrine established by this Court that "Being but creatures of the State, municipal corporations have no standing to invoke . . . the provisions of the Fourteenth Amendment of

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Metro is prevented by the Eleventh Amendment from so doing. None of the cases cited by Metro supports an expansion of the limited prospective compliance exception to the Eleventh Amendment such that non-victims may independently sue the state for money. The additional factor that Metro itself is a constitutional wrongdoer, further prevents its identification with victims of discrimination.[15]

From factual and historical perspectives, the cited cases depict a distinct pattern of long term state and local control over public schools which perpetuated racial segregation for decades after *Brown*. In each instance, claims of state involvement in interdistrict violations were presented. In the *Indianapolis* case, the State of Indiana was found *solely* responsible for interdistrict violations. *Indianapolis*, 677 F.2d at 1187. Imposition of liability upon state defendants in the *Little Rock* case was based upon proof of active and continuing state interference

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the Constitution in opposition to the will of their creator." *Coleman v. Miller*, 307 U.S. 433, 441 (1939). See also *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1922). This principle is recognized in the lower federal courts, *see South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *United States v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), and on the state level, *City of Knoxville v. State ex rel. Hayward*, 175 Tenn. 159, 133 S.W.2d 465 (1939). The Sixth Circuit opinion discusses and applies this principle, yet Metro does not address it. *Kelley*, 836 F.2d at 998.

[15]In *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), where the Kansas City school district, along with individual plaintiffs, had originally filed suit against the State, the court of appeals affirmed the district court's realignment of the local school district as a defendant recognizing the local district's conflict of interest with individual victims and lack of standing to sue the state. *Id.* at 682.

with housing and school facility placement as well as enforcement of discriminatory laws perpetuating segregation. *Little Rock*, 778 F.2d at 411-17, 423-27. In *Liddell*, the State of Missouri's maintenance of a separate special district for vocational education within the St. Louis school district was found to be a factor contributing to segregation within the St. Louis system. *Liddell*, 667 F.2d at 651. In contrast, the Sixth Circuit, having reviewed the record in this case, found no proof of ongoing constitutional violations by the State of Tennessee. *Kelley*, 836 F.2d at 993-994. Furthermore, control over Metro desegregation has been in the hands of the district court since 1957.

Finally, the Sixth Circuit's decision is in fact consistent with that of the Fifth Circuit. In an analogous case, the Court of Appeals for the Fifth Circuit held that the Eleventh Amendment barred a local school district's attempt to recover money from the State to cover its desegregation expenditures. *United States v. Texas Education Agency*, 790 F.2d 1962, *cert. denied* 107 S.Ct. 874 (1986). That the local school district could have moved to amend the district court judgment to adjudicate the State's fault, but neglected to do so for a period of years, was of particular import to the decision reached. Like the Sixth Circuit in the present indemnification action, the Fifth Circuit rejected the suit as a "belated effort to recover costs which smacks of an attempted end-run around the Texas legislature's allocation of state funds." *Id.* at 1265.

III.

THE COURT OF APPEALS' OPINION THAT IT WOULD BE AN INAPPROPRIATE EXERCISE OF FEDERAL EQUITY JURISDICTION AND AN IMPERMISSIBLE INTRUSION UPON STATE LEGISLATIVE AUTHORITY TO REQUIRE THE STATE TO INDEMNIFY METRO FOR 60% OF ITS DESEGREGATION COSTS IS CONSISTENT WITH PRECEDENTS OF THIS COURT AND OTHER CIRCUITS

In concluding that a federal court should not intervene in the financial relationship between a state and one of its political subdivisions, the court of appeals was correctly adhering to established principles of equity as well as the opinions of this Court and the courts of appeal of other circuits. Moreover, this case is unique, and because of its particular factual history, its unusual alignment of parties and the mix of state and federal law involved, conclusions regarding the exercise of equity jurisdiction in this case would have limited application elsewhere.[16]

The exercise of federal jurisdiction to reallocate educational costs between this state and this political subdivision is unnecessary to protect any constitutional rights of the affected students. The plaintiffs who sued Metro, but have not sued the state, are already receiving full relief.

---

[16]The court of appeals held that, in addition to the Eleventh Amendment, the relief in this case should be denied as an inappropriate exercise of Federal equity powers. Therefore, even if the Eleventh Amendment were held insufficient to bar review of this case, the petition should not be granted and the court of appeals reversed unless the appellate court's actions were found, after an examination of the facts, to be an improper exercise of its discretion.

Kelley, 836 F.2d at 989-90.[17] No further federal court action is needed to assure compliance with constitutional rights guaranteed these students.

Exercise of federal jurisdiction to reallocate certain educational costs is not only unnecessary to accomplish constitutional requirements, it is also inappropriate under the facts of this case. To open the doors of federal courts to such disputes is to invite political subdivisions to circumvent the statutory and constitutional processes by which the fifty states govern funding decisions[18] and to

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[17]Metro asserts that it is proper for it to "step into the shoes of the plaintiffs" (Petition, p. 13, n.9). To suggest that the plaintiffs who initiated this desegregation case over thirty years ago and have continued throughout to actively pursue it are litigants whose shoes need to be filled is to ignore their effective advocacy throughout. Furthermore, it would be ironic for such a role to be assigned to Metro, a litigant which for more than two decades opposed the plaintiffs.

In the one precedent cited by Metro, a 1974 court of appeals case, the opinion of the court (with each judge writing separately, one concurring in part and dissenting in part and the other dissenting) stated that "in the *unique facts of this case*, the Akron Board of Education has standing to bring this action. *Akron Board of Education v. State Board of Education of Ohio*, 490 F.2d 1285, 1291 (6th Cir. 1974), cert denied 417 US 932 (1974). (Emphasis added.) That case concluded that a local school board could seek an injunction to prevent an action "to deprive Akron school students of their constitutional right to attend nonsegregated schools." *Id.* at 1288. Here, however, the original plaintiffs, not Metro, fully protected the constitutional rights of students. Moreover, the relief sought is an award of money not an injunction to block an act by the state.

In fact, however, Metro "has sued solely in its own right . . . and thus is barred . . . by the principle recognized in *Dartmouth College* and *City of Trenton*." *Kelley*, 836 F.2d at 998. *See also* Footnote 14.

[18]For example Article II, Section 24 of the Constitution of the State of Tennessee provides that "No public money shall be expended except pursuant to appropriations made by law." (Appendix A-1)

impose a new and burdensome role for federal courts. This is an internal dispute between a state and one of its political subdivisions. Those disputes have been properly left for resolution outside the federal court system.[19]

What Metro has asked the federal courts to do is to choose one particular method of funding a county's educational costs rather than any other method and to impose that selection on the State. The court of appeals noted that "[t]he State currently underwrites about 30% of Metro's non-transportation costs, and it pays a still larger share of the costs of transportation; Metro, however, wants more." *Kelley*, 836 F.2d at 990. Although the court of appeals found that the plaintiffs have full relief and that desegregation costs are being paid, Metro asks that the burden be shifted.

It would be ironic and inappropriate for a political subdivision which fought desegregation of its schools for over two decades to be allowed to shift to others the financial burden of finally adhering to constitutional requirements. It would be inconsistent with sound principles of equity for a federal court to lift the burden from a political subdivision which has previously sought to avoid school integration and now seeks to avoid expenditures necessary to meet its constitutional obligations.

Metro asserts that "the Sixth Circuit has rejected the efforts of Davidson County . . . to both desegregate and to educate.' Petition, p. 23. The court of appeals has not. Instead it has told Metro that it must desegre-

---

[19]See Footnote 14.

gate, that it must educate, and that those responsibilities will not be shifted to the State. Adequate funding for programs for desegregation and for education is possible within the legal authority to tax and spend at the local level of government.

Finally, the court of appeals noted that courts of equity "do not leave their doors open to prospective suitors forever." Nor can courts of equity expect that a third-party brought into a proceeding over twenty-six years after its inception is not prejudiced by its absence.[20] Furthermore, the district court's order of 60% indemnification of Metro bears no apparent connection to any prior acts of the state and is not a remedy tailored to any alleged present wrongful acts of the State. In fact there is no foundation in the record for the 60% allocation. *Kelley*, 836 F.2d at 1000.

———o———

[20]The Court of Appeals for the Fifth Circuit noted such a delay in *United States v. Texas Education Agency*, 790 F.2d at 1265:

> [The Lubbock Independent School District ("LISD")] certainly could have moved in 1977—or as early as 1970—for the district court to amend its judgment so as explicitly to adjudicate the State of Texas' fault. See Fed.R.Civ.P. 60(b). Further, the LISD could have moved in 1977, once it became clear what the effort to desegregate would cost, that the court divide these costs among the parties deemed responsible for the then-existing segregation. *Cf. Milliken II*, 433 U.S. at 283. But the LISD pursued neither of these alternatives, and we express no view of what their proper resolution might have been. We are left instead with the LISD's belated effort to recover costs which smacks of an attempted end-run around the Texas legislature's allocation of state funds. Yet the State has not been an active party to this suit since 1970, and it has never been adjudicated responsible for that segregation in Lubbock which has proven costly to eliminate.

CONCLUSION

Based upon the foregoing authorities and analyses, the respondents respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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No. 87-1774

Supreme Court, U.S.
FILED
MAY 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,

Petitioners,

vs.

STATE OF TENNESSEE, et al.,

Respondents.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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53 pp

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TENNESSEE CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of State of Tennessee, Article 2 § 24:

> Sec. 24. Appropriation of public moneys.—No public money shall be expended except pursuant to appropriations made by law. Expenditures for any fiscal year shall not exceed the state's revenues and reserves, including the proceeds of any debt obligation, for that year. No debt obligation, except as shall be repaid within the fiscal year of issuance, shall be authorized for the current operation of any state service or program, nor shall the proceeds of any debt obligation be expended for a purpose other than that for which it was authorized.
>
> In no year shall the rate of growth of appropriations from state tax revenues exceed the estimated rate of growth of the state's economy as determined by law. No appropriation in excess of this limitation shall be made unless the General Assembly shall, by law containing no other subject matter, set forth the dollar amount and the rate by which the limit will be exceeded.
>
> Any law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding.
>
> No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.
>
> An accurate financial statement of the state's fiscal condition shall be published annually. [As amended; Adopted in Convention November 30, 1977; approved at election March 7, 1978; Proclaimed by Governor, March 31, 1978.]

Tenn. Code Ann. § 49-3-315 (Supp. 1987):

> 49-3-315. Local tax levy. — Special transportation tax levy and fund—(a) For each LEA there

shall be levied for current operation and maintenance not more than one school tax for all such grades as may be included in the LEA. Each LEA shall place in one (1) separate school fund all school revenues for current school operation purposes received from the state, county, and other political subdivisions, if any. However, any county in which only one (1) pupil transportation system is operated and which has within its borders a city or special district operating a system of public schools and which county in the current school year operates a system of public school transportation, may levy a special tax to cover that portion of the total cost of such public school transportation system as is in excess of the state funds appropriated for student transportation of such county. The proceeds of such special transportation tax levy shall be set up in a special account hereinafter to be known as the "public school pupil transportation fund" and shall be disbursed on order of the county board of education for public school transportation services only. All school funds for current operation and maintenance purposes collected by any county, except the funds raised by any local special student transportation tax levy as authorized in this subsection, shall be apportioned by the county trustee among the LEA's therein on the basis of the WFTEADA maintained by each, during the current school year. For the purposes of making the apportionment of local school funds as set forth in this subsection, and in defining the WFTEADA for the current school year, the county superintendent of schools and the county trustee shall be guided by the following procedure:

(1) The county superintendent of schools shall recertify to the county trustee at the end of the first quarter of the current fiscal year the WFTEADA during the preceding school year;

(2) During each of the first and second quarters of the current school year the county trustee shall use

the WFTEADA figure for the preceding school year as recertified to him by the county superintendent of schools in making the tentative apportionments of the school funds as provided for in this subsection during the first and second quarters of the current school year;

(3) Before the end of the third quarter of the current school year the county superintendent of schools shall certify to the county trustee the best estimate which he can make of the WFTEADA in the schools of the LEA's in such county, during the current school year; and upon this best estimate, the county trustee shall make the tentative apportionments of school funds for the third quarter of the current school year;

(4) As early as possible before the close of the current school year, the county superintendent of schools shall certify to the county trustee the correct WFTEADA for the entire current school year;

(5) Thereupon, the county trustee shall apportion the entire amount of county school funds for the current school year in keeping with the provisions of this subsection, on the basis of the correct total WFTEADA during the current school year in the LEA's, making such adjustments as may be necessary on account of the tentative apportionments made to such LEA's during the first three (3) quarters of the current school year.

(b)(1) The state school funds distributed under the provisions of this part to a county for county schools shall be paid to the county trustee in the amounts as certified under the authority of the commissioner.

(2) Such funds for a LEA other than a county LEA shall be distributed directly to the treasurer or proper fiscal agent of such LEA in the amounts as certified under the authority of the commissioner.

(3) The county trustee shall be properly bonded as now provided by law; the treasurer or fiscal agent of LEAs, other than a county LEA, shall be bonded in an amount, in the manner in the form and be conditioned as prescribed by law for county trustees. Immediately upon receipt of a properly executed bond, the state comptroller shall notify the commissioner of education. [Acts 1977, ch. 289, § 12; 1981, ch. 357, § 1; T.C.A. § 49-614; Acts 1987, ch. 21, § 1.]

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT W. KELLEY,	)	
	)	
Plaintiff	)	
	)	
VS.	)	
	)	
METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,	)	CIVIL ACTION
	)	
Defendants and Third Party Plaintiffs	)	NOS. 2094, 2956
	)	
VS.	)	
	)	
STATE OF TENNESSEE; LAMAR ALEXANDER, Governor of the State of Tennessee; ROBERT L. McELRATH, Commissioner of Education; STATE BOARD OF EDUCATION and its members in their offical capacities TOY F. REID, RICHARD E. RAY, KATHY KEMP, WILLIAM H. SWAIN, NELSON ANDREWS, FRANK GORRELL, JUDGE PAUL SUMMERS, CYNTHIA BOND, S. C. KOPALD, JR., and its Executive Director, BRENT POULTON,	)	(Filed March 27, 1985)
	)	
Third party Defendants	)	

AMENDED THIRD PARTY COMPLAINT

1. On September 23, 1955, plaintiff class members filed a complaint against the defendant Board of Educa-

tion of the City of Nashville, Davidson County, Tennessee, the individual members of the Board, the Superintendent of Schools of the City of Nashville, and other school employees in a case styled *Kelley v. Board of Education of Nashville and Davidson County, Tennessee, et al.*, Civil Action No. 2094.

2. On September 19, 1960, plaintiff class members filed a similar complaint against the Board of Education of Davidson County, the individual members of the Board, and the Superintendent of the County school system in a case styled *Maxwell v. Board of Education of Davidson County*, Civil Action No. 2956.

3. On September 10, 1963, after the advent of the Metropolitan Government of Nashville and Davidson County, these cases were consolidated, and as of December 4, 1964, the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, its individual members, and its Director of Schools, were substituted as party defendants for the original defendants in both actions previously described.

4. The third party defendant, State of Tennessee, is the governmental entity which has been in the past, and is at present, the ultimate policy maker for the various systems of public education across the state. The State of Tennessee performs various functions regarding public education, including the supervision and the funding of the largest part of the local school system's budget through the *"Minimum Foundation Program,"* and other funding programs. In actuality, public education in the State of Tennessee is a function of the State of Tennessee rather than of any individual county or city.

5. The third party defendant, Governor Lamar Alexander, is sued in his official capacity as the Chief Executive Officer of this state. The Governor and his predecessors have been and are charged with the enforcement of all state laws, including the segregation laws which are the subject of this action. Under the recently enacted "Public Education Grovernance Reform Act of 1984," the Governor appoints the appointed members of the Board of Education (eight of nine) with the consent of the legislature. (T.C.A. § 49-1-301.) The Governor also appoints the Commissioner of Education and proposes legislation for the governance of public elementary and secondary schools and budgets for the state funding of elementary and secondary schools.

6. The third party defendant, Commissioner of Education Robert L. McElrath, is sued in his official capacity as head of the Department of Education and as former Chairman of the Board of Education. (T.C.A. § 49-1-201 and its precursor statutes.) In the past, the Commissioner and his predecessors have had the primary role in the administration of the state's policies regarding public education pursuant to T.C.A. §§ 49-1-101 *et seq.* and their precursor statutes. Under the Public Education Governance Reform Act of 1984, the Commissioner of Education is charged with, among other duties, the provision of such assistance as is necessary to the State Board of Education in implementing the Board's policies and procedures, and the making of recommendations for policies to the Board of Education. (T.C.A. §§ 49-1-102 and 40-1-201.)

7. The third party defendants, State Board of Education, and its members, Toy F. Reid, Richard E. Ray,

Kathy Kemp, William H. Swain, Nelson Andrews, Frank Gorrell, Judge Paul Summers, Cynthia Bond, S. C. Kopald, Jr., and its Executive Director, Brent Poulton are, and have been in the past (along with the Comissioner) responsible for the administration of public elementary, junior high, and high schools at the state level, including, but not limited to, the establishment of rules and regulations for the operation of local public schools, grades K-12. (T.C.A. §§ 49-1-102, 49-1-302 and their precursor statutes.) The current duties of the Board of Education, its members and Director, as described in detail in the Public Education Goverance Reform Act of 1984, T.C.A. §§ 49-1-301 *et seq.* and the Comprehensive Education Reform Act of 1984 (Master Teacher Program), T.C.A. §§ 49-5001, *et seq.* are indicative of these defendants' and the other state defendants' authority for the governance of public education in grades K-12 throughout the state.

JURISDICTION

8. Jurisdiction of this third party complaint is ancillary in nature.

ALLEGATIONS

9. At the time the original complaint was filed in this case, the State of Tennessee had declared public education a state function. Article 11, Section 12 of the Constitution of Tennessee provided, *inter alia*:

> Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the state, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all

> future periods of this Government, to cherish literature and science and the fund called common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this state for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriations; and the interest thereof shall be inviably appropriated to the support and encouragement of common schools throughout the state, and for the equal benefit of all people thereof; and no law shall be made authorizing said fund or any part thereof to be divested to any other use than the support and encouragement of common schools. The state taxes, derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall from time to time direct by law.
>
> [Amended March 31, 1978]

Pursuant to this mandate, the legislature of Tennessee established a uniform system of free public education, as set out in the Code of Tennessee of 1932, Sections 2306-2540.3, which system continues to this day under the 1978 amendment to Article 11, Section 12, and under T.C.A. §§ 49-1-101 *et seq.* and its precursor statutes. The administration of this system of public education has been in the past and is now vested in the Commissioner of Education and the State Board of Education, and also in the county and city Board of Education and their superintendents. (T.C.A. § 49-1-102 and its precursor statutes.)

10. Through the "Minimum Foundation Program" and other funding provisions contained in T.C.A. §§ 49-3-101 *et seq.* and their precursor statutes, the third party

defendants have direct control over the largest percentage of monies received by local school systems. Criteria for expenditures of these funds have been established by the state defendants.

11. At the time this suit was filed, it was the policy of the State of Tennessee, through the Constitution of the State of Tennessee and through state statute, that all schools in this state would be segregated. The applicable provisions at that time were as follows:

> Constitution of 1870, Article 11, Section 12:
>
> . . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . . .
>
> Code of Tennessee, 1932, Sections 11395 6888a37.
>
> Unlawful for white and colored persons to attend same school.—It shall be unlawful for any school, academy, college or other place of learning to allow white and colored persons to attend the same school, academy, or other place of learning. (1901, Chapter 7, Section 1.)
>
> Code of Tennessee, 1932, Sections 11396 6888a38.
>
> Unlawful for teacher to allow such mixed attendance to to teach them in same class.—It shall be unlawful for any teacher, academy, or school of learning to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement. (*Ib.*, Section 2.)
>
> Code of Tennessee, 1932, Sections 11397 6888a39.
>
> Violation is a misdemeanor fine and imprisonment.—Any person violating any of the provisions of this

Article, shall be guilty of a misdemeanor and, upon conviction, shall be fined for each offense $50, and imprisonment not less than 30 days nor more than 6 months. (*Ib.*, Section 4, modified.)

Michie's Tennessee Code of 1938, Section 2377.

Schools designed for children; separate schools for white and nego children. The county board of education shall designate the [elementary] schools which the children shall attend; provided, that separate schools shall be established and maintained for white and negro children. (1925, Chapter 115, Section 13.) Michie's Tennessee Code of 1938, Section 2393(9).

Who admitted to high school; separation of white and colored pupils—Junior high schools sharing in the state and county high school funds shall be open without tuition to all children of the county; provided, that only those who have completed the eight grades of the elementary school or their equivalent shall be admitted to junior high schools of form one; and that those who have completed the six grades of the elementary school, or their equivalent, shall be admitted to junior high schools of form two or of form three; senior high schools of four grades shall be open to all children of the county who have completed the eight grades of the elementary school or their equivalent; and senior high schools of three grades shall be open to all children of the county who have completed the ninth grade, or its equivalent, in a junior high school; provided that separate schools shall be maintained for white and nego pupils. (1931, Chapter 71, Section 1.)

12. In accordance with these state mandates, enforced by the State, the Governor, the Commissioner of Education and the State Board of Education, defendant City and County school systems established separate schools for Whites and Negroes, which schools this court and the Supreme Court of the United States subsequently found to

be contrary to law and a violation of the plaintiffs' civil rights.

13. At all times prior to this ruling by the court, the defendants Board of Education, *et al.*, were operating the separate schools, based not upon their own policy, but upon the policy mandated and enforced by the third party defendants.

14. Since the institution of this action in 1955, the plaintiffs have repeatedly asked for further relief from the named defendants, in an effort to eliminate the alleged vestiges of segregation directly resulting from policies of the third party defendants.

15. During the intervening years, the third party defendants have taken no action directed specifically toward eliminating these alleged vestiges in the defendant school system, in spite of their duty to do so.

16. Indeed, it is not clear that the third party defendants' statutes requiring segregation were ever formally stricken from the Code of Tennessee, and it was not until 1978 that the State of Tennessee struck the illegal segregation language from its Constitution.

17. During the interim phases of this litigation, it was the defendant State, the Governor, the Commissioner of Education, and the State Board of Education, not the defendant Board of Education, which promulgated the school preference law subsequently struck down by the court as in inadequate desegregation remedy. Specifically, while the defendant Board of Education in good faith grounded its desegregation plan on this state law, the court found that the law did not meet the duty to eliminate

the vestiges of prior state-imposed segregation. At the hearing of this cause on the issue, the state appeared, through its Attorney General, as an *amicus curiae* supporting the school preference law.

18. During the interim phases of this lawsuit, the state defendants have continued to promulgate and accept state laws which have been directed toward impeding local school systems in their efforts to desegregate.

19. During the interim phases of this litigation, the present defendants have expended considerable time and resources in an effort to eliminate all effects of the third party defendants' policies and procedures.

20. Since the court's order of 1971, the third party defendants have specifically approved the location of and provided substantial funds for the various comprehensive high schools around the city, which schools have been complained of by the plaintiffs. In addition, further funds from the third party defendants are anticipated as being spent on the two future comprehensive high schools under this court's order of June 1, 1983, which is directed toward elimination of the last vestiges of state-imposed segregation.

21. For the past several years, the defendant Metropolitan Board of Education, has operated its school system on a continuation or survival budget. During the period of this lawsuit, state funds for transportation to the Metropolitan Board of Education have been reduced. This short fall in funding has come at a time when the Board is attempting to implement new programs and to expand its transportation system to eliminate for all times the final

vestiges of the third party defendants' former practices pursuant to the court's order of June 1, 1983.

22. The third party defendants are and should be liable to the present defendants for a proportionate share of the responsibility for effecting a unitary school system in Nashville and Davidson County, as envisioned by the court in its order of June 1, 1983, and in previous orders.

WHEREFORE, PREMISES CONSIDERED, DEFENDANTS PRAY:

1. That process issue and be served upon the third party defendants requiring them to appear and defend, and to answer this complaint within twenty (20) days.

2. That the third party defendants be responsible as equity requires in terms of resources, time, and effort for any and all past and future remedies imposed by this court.

3. That the third party defendants be enjoined from diminishing the Board of Education's allotment of funds, or from diminishing in any way because of this action the "*Minimum Foundation Program*" or other funding programs currently operating to benefit financially the defendant Board of Education.

4. That any decree ordering the state defendants to participate in the desegregation remedy envisioned by the court provide for state funds in addition to the current level of funding provided by the state to the defendant Board of Education under the state's "*Minimum Foundation Program*" and other funding programs.

5. That the third party defendants indemnify the Board of Education for all monetary awards entered

against it, including, but not limited to, requests for attorneys' fees by the plaintiffs, now set by the District Court's judgment at $139,214.25 and costs of $361.28. Should this amount change as a result of any court decisions, this paragraph should be deemed automatically amended to include such sums.

6. That the state indemnify the Board of Education for all costs, expenses and attorneys' fees incurred as a necessary part of this litigation from 1971 to 1983 in the approximate amount of $30 million. The 1983 plan recently approved by the District Court, without objection by the state defendants, is projected to cost the school system approximately $5.9 million for the first year of operation, in addition to the $3.2 million spent annually for desegregation purposes under the 1971 order. Accordingly, the first year of operation under the new plan will cost approximately $9.1 million. Annual recurring costs of the plan will be approximately $6 million per year until 1986-87, at which time the costs will be increased by an undetermined amount when the Martin Luther King, Jr. Magnet High School for the Health Sciences is established. In addition, the plan calls for the building of two new comprehensive high schools, Goodlettsville-Madison and Pearl-Cohn at an estimated cost of $29 million. Payment for these buildings and the average annual payments on interest and principal of approximately $2.93 million per year should also be borne by the state.[1]

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[1] The first year of this desegregation plan has just been completed. In addition, bids have been let for construction of these high schools. Accordingly, the third party plaintiffs are now in

(Continued on following page)

7. That the state indemnify the Board of Education for all costs, expenses, and attorneys' fees incurred during this litigation from 1955 to 1972 should the Memorandum and Order entered by this court on February 23, 19— be reversed insofar as the finality of the 1972 order.

8. For such other and further relief as the defendants may be entitled.

WILLIS & KNIGHT

By: /s/ William R. Willis, Jr.

By: /s/ Marian F. Harrison
215 Second Avenue North
Nashville, TN 37201
Attorneys for Defendants and
Third Party Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing amended complaint has been forwarded to Mr. Steve Doughty, Deputy Attorney General, 450 James Robertson Parkway, Nashville, TN 37219 and Mr. Avon Williams, Attorney for Plaintiffs, 203 Second Avenue North, Nashville, TN 37201 on this 27th day of March, 1985.

WILLIS & KNIGHT

By: /s/ Marian F. Harrison

(Continued from previous page)

a position to better estimate what its expenses are. As soon as they have been ascertained, those figures will be presented as an additional amendment in time for the hearing on the amount of the state's participation, if any.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT W. KELLEY, ET AL.	)	
	)	
VS.	)	
	)	
METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL.	)	
	)	
VS.	)	NOS. 2094, 2956
	)	
STATE OF TENNESSEE; LAMAR ALEXANDER, GOVERNOR OF THE STATE OF TENNESSEE; ROBERT L. McELRATH, COMMISSIONER OF EDUCATION; and STATE BOARD OF EDUCATION	)	(Filed March 26, 1981)

THIRD PARTY COMPLAINT

1. On September 23, 1955, Plaintiff class members filed a Complaint against the Defendant Board of Education of the City of Nashville, Davidson County, Tennessee, the individual members of the Board, the Superintendent of Schools of the City of Nashville, and other school employees in a case styled *Kelley v. Board of Education of Nashville and Davidson County, Tennessee, et al,* Civil Action No. 2094.

2. On September 19, 1960, Plaintiff class members filed a similar Complaint against the Board of Education of Davidson County, the individual members of the Board, and the Superintendent of the County school system in a

case styled *Maxwell v. Board of Education of Davidson County,* Civil Action No. 2956.

3. On September 10, 1963, after the advent of the Metropolitan Government of Nashville and Davidson County, these cases were consolidated, and as of December 4, 1964, the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, its individual members, and its Director of Schools, were substituted as party Defendants for the original Defendants in both actions previously described.

4. The Third Party Defendant State of Tennessee is the governmental entity which has been in the past, and is at present, the ultimate policy maker for the various systems of public education across the state. The State of Tennessee performs various functions regarding public education, including the supervision and the funding of the largest part of the local school system's budget through the "*Minimum Foundation Program.*" In actuality, public education in the State of Tennessee is a function of the State of Tennessee rather than of any individual county or city.

5. The Third Party Defendant Governor, Lamar Alexander, is sued in his official capacity as the chief executive officer of this state. The Governor has been and is charged with the enforcement of all state laws, including the segregation laws which are the subject of this action. The Governor appoints the Commissioner of Education and prepares proposed budgets for the state funding of education.

6. The Third Party Defendant Commissioner of Education, Robert L. McElrath, is sued in his official

capacity as head of the Department of Education. The Commissioner bears the primary responsibility for enforcement of the state's policies regarding public education pursuant to T.C.A. §§ 49-101, *et seq.*, and its precursor statutes.

7. The Third Party Defendant State Board of Education participates, along with the Commissioner, in the administration of public education in Tennessee, pursuant to T.C.A. § 49-102, and its precursor statutes.

JURISDICTION

8. Jurisdiction of this Third Party Complaint is ancillary in nature.

ALLEGATIONS

9. At the time the original Complaint was filed in this case, the State of Tennessee had declared public education a state function. Article 11, Section 12 of the Constitution of Tennessee provided, *inter alia*:

> "Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the state, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government, to cherish literature and science and the fund called common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this state for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriations; and the interest thereof shall be inviably appropriated

> to the support and encouragement of common schools throughout the state, and for the equal benefit of all people thereof; and no law shall be made authorizing said fund or any part thereof to be divested to any other use than the support and encouragement of common schools. The state taxes, derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall from time to time direct by law."
>
> [Amended March 31, 1978.]

Pursuant to this mandate, the Legislature of Tennessee established a uniform system of free public education, as set out in the Code of Tennessee of 1932, Sections 2306-2540.3, which system continues to this day under the 1978 amendment to Article 11, Section 12, and under T.C.A. §§ 49-101, *et seq.* The administration of this system of public education has been in the past and is now vested in the Commissioner of Education and the State Board of Education, and also in the county and city boards of education and their superintendents. T.C.A. § 49-104.

10. Through the "*Minimum Foundation Program,*" and other funding provisions contained in T.C.A. §§ 49-601, *et seq.*, and its precursor statutes, the State of Tennessee, the Governor, the Commissioner of Education, and the State Board of Education have direct control over the largest percentage of monies received by local school systems. Criteria for expenditures of these funds have been established by the State of Tennessee, the Governor, the Commissioner of Education, and the State Board of Education.

11. At the time this suit was filed, it was the policy of the State of Tennessee, through the Constitution of the

State of Tennessee and through state statute, that all schools in this state would be segregated. The applicable provisions at that time were as follows:

> Constitution of 1870, Article 11, Section 12: ". . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . . ."
>
> Code of Tennessee, 1932, Sections 1139568 68888a37.
>
> "Unlawful for white and colored persons to attend same school.—It shall be unlawful for any school, academy, college or other place of learning to allow white and colored persons to attend the same school, academy, or other place of learning." (1901, Chapter 7, Section 1).
>
> Code of Tennessee, 1932, Sections 11396 6888a38.
>
> "Unlawful for teacher to allow such mixed attendance or to teach them in same class.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement." (*Ib.*, Section 2)
>
> Code of Tennessee, 1932, Sections 11397 6888a39.
>
> "Violation is a misdemeanor; fine and imprisonment. —Any person violating any of the provisions of this Article, shall be guilty of a misdemeanor and, upon conviction, shall be fined for each offense $50, and imprisonment not less than 30 days nor more than 6 months." (*Ib.*, Section 4, modified.)

Michie's Tennessee Code of 1938, Section 2377.

"Schools designated for children; separate schools for white and negro children. The county board of education shall designate the [elementary] schools which the children shall attend; provided, that separate schools shall be established and maintained for white and negro children." (1925, Chapter 115, Section 13).

Michie's Tennessee Code of 1938, Section 2393(9).

"Who admitted to high school; separation of white and colored pupils—Junior high schools sharing in the state and county high school funds shall be open without tuition to all children of the county; provided, that only those who have completed the eight grades of the elementary school or their equivalent shall be admitted to junior high schools of form one; and that those who have completed the six grades of the elementary school, or their equivalent, shall be admitted to junior high schools of form two or of form three; senior high schools of four grades shall be open to all children of the county who have completed the eight grades of the elementary school or their equivalent; and senior high schools of three grades shall be open to all children of the county who have completed the ninth grade, or its equivalent, in a junior high school; provided that separate schools shall be maintained for white and negro pupils." (1931, Chapter 71, Section 1).

12. In accordance with these state mandates, enforced by the State, the Governor, the Commissioner of Education and the State Board of Educataion, Defendant City and County school systems established separate schools for Whites and Negroes, which schools this Court and the Supreme Court of the United States subsequently found to be contrary to law and a violation of the Plaintiffs' civil rights.

13. At all times prior to this ruling by the Court, the Defendants Board of Education, et al, were operating the separate schools, based not upon their own policy, but upon the policy mandated and enforced by the Third Party Defendants.

14. Since the institution of this action in 1955, the Plaintiffs have repeatedly asked for further relief from the named Defendants, in an effort to eliminate the alleged vestiges of segregation directly resulting from policies of the Third Party Defendants.

15. During the intervening years, the Third Party Defendants have taken no action directed specifically toward eliminating these alleged vestiges in the Defendant school system, in spite of their duty to do so.

16. Indeed, it is not clear that the Third Party Defendants' statutes requiring segregation were ever formally stricken from the Code of Tennessee, and it was not until 1978 that the State of Tennessee struck the illegal segregation language from its Constitution.

17. During the interim phases of this litigation, it was the Defendant State, the Governor, the Commissioner of Education, and the State Board of Education, not the Defendant Board of Education, which promulgated the school preference law subsequently struck down by the Court as an inadequate desegregation remedy. Specifically, while the Defendant Board of Education in good faith grounded its desegregation plan on this state law, the Court found that the law did not meet the duty to eliminate the vestiges of prior state-imposed segregation. At the hearing of this cause on the issue, the state appeared,

through its Attorney General, as an *amicus curiae* supporting the school preference law.

18. During the interim phases of this litigation, the present Defendants have expended considerable time and resources in an effort to eliminate all effects of the Third Party Defendants' policies and practices.

19. Since the Court's Order of 1971, the Third Party Defendants have specifically approved the location of and provided substantial funds for the various comprehensive high schools around the city, which schools have been complained of by the Plaintiffs. In addition, further funds from the Third Party Defendant are anticipated as being spent on the two future comprehensive high schools under the Court's Order of May 20, 1980, which is directed toward elimination of the last vestiges of state-imposed segregation.

20. For the past several years the Defendant Metropolitan Board of Education, has operated its school system on a continuation or survival budget. It is the Defendant Board of Education's understanding that the state Defendants are suggesting and intend at this time to decrease their "*Minimum Foundation Grants,*" thereby reducing the Board's budget below continuation status. This comes at a time when the Board is attempting to implement new programs to eliminate for all times the final vestiges of the Third Party Defendants' former practices pursuant to the Court's Order of May 20, 1980.

21. The Third Party Defendants are and should be liable to the present Defendants for a proportionate share of the responsibility for effecting a unitary school system

in Nashville and Davidson County, as envisioned by the Court in its Order of May 20, 1980.

WHEREFORE, PREMISES CONSIDERED, DEFENDANTS PRAY:

1. That process issue and be served upon the Third Party Defendants requiring them to appear and defend, and to answer this Complaint within twenty (20) days.

2. That the Third Party Defendants be made partially responsible as equity requires in terms of resources, time, and effort for any and all future remedies imposed by this Court.

3. That the Third Party Defendants be enjoined from diminishing the Board of Education's allotment of funds, or from diminishing in any way because of this action the "*Minimum Foundation Program*" or other funding programs currently operating to benefit financially the Defendant Board of Education.

4. That any decree ordering the State Defendants to participate in the desegregation remedy envisioned by the Court provide for state funds in addition to the current level of funding provided by the state to the Defer dant Board of Education under the state's "*Minimum Foundation Program*" and other funding programs.

5. For such other and further relief as the Defendants may be entitled.

WILLIS & KNIGHT

/s/ By William R. Willis, Jr.

William R. Willis, Jr.

/s/ By Marian F. Harrison

Marian F. Harrison
Attorneys for Defendant Board of Education
215 Second Avenue, North
Nashville, Tennessee 37201

I CERTIFY THAT A COPY OF THE ABOVE PLEADING HAS BEEN FURNISHED TO COUNSEL FOR ALL INTERESTED PARTIES BY DELIVERY OR BY PLACING SAME IN THE UNITED STATES MAIL, POSTAGE PREPAID.

THIS 26 DAY OF MARCH, 1981.

WILLIS & KNIGHT

/s/ By Marian F. Harrison

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT W. KELLEY, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
VS.	)	NOS. 2094, 2956
	)	
METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL.,	)	(Received March 9, 1983)
	)	
Defendants.	)	

MEMORANDUM

On March 26, 1981, this Court granted, pursuant to Rule 14, Fed. R. Civ. P., defendant Board of Education's motion to make the State of Tennessee, the Governor of the State of Tennessee, the Commissioner of Education, and the State Board of Education ("State defendants") parties to this lawsuit. Now pending is State defendants' motion to vacate that order.

This Court has previously documented the facts and issues of Nashville school desegregation case which is now entering its twenty eighth year, and that history will not be repeated here. See 492 F. Supp. 167 (M.D. Tenn. 1980). The only issue here is whether the State defendants should remain as parties to this lawsuit. The State defendants have moved the Court to vacate its March 26, 1981 order and thereby eliminate the State defendants' exposure to a future ruling that it must bear some of the costs incurred by defendant Board of Education ("Board").

State defendants contend that their rights have been unduly prejudiced by their entry into the lawsuit some twenty-six years after its inception and less than one week before this Court had scheduled final hearings on the issue of pupil assignment. Moreover, State defendants argue that they are now being asked to contribute potentially large sums of money to implement a plan in which they had no meaningful input, even though they had considerable professional expertise which could have been utilized had there been more time to do so.

Other equitable principles, however, militate in favor of keeping the State defendants as parties in this litigation. "It is a basic equitable principle that the wrongdoer is liable for the cost of rectifying his wrongful conduct." *United States v. Board of School Commissioners of Indianapolis,* 677 F. 2d 1185, 1188 (7th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3460 (U.S. Dec. 13, 1982) (No. 82-479). In that case, the Seventh Circuit affirmed the district court's ruling that the State of Indiana should bear the entire cost of desegregating the Indianapolis schools. 677 F. 2d at 1186.

It is undisputed that wrongdoing on the part of the State of Tennessee is a [sic] least partially responsible for the segregation of Nashville schools. At the time this suit was filed, the Constitution of the State of Tennessee as well as a number of state statutes mandated a segregated school system. Article 11, Section 12 of the Tennessee Constitution provided that

> No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school.

See also Tenn. Code Ann. Sec. 49-3701 *et. seq.* The historical fact of de jure segregation in Tennessee continues to affect the stance taken by the courts in fashioning the appropriate desegregation remedy. See *Kelley v. Metropolitan City Board of Education,* No. 81-5370, July 27, 1982 (6th Cir.) (slip opinion at p.2).

The Supreme Court has stated that

> (w)here plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown v. Board of Education,* 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) (Brown I), the State automatically assumes an affirmative duty "to effectuate a transition to a racially non-discriminatory school system," *Brown v. Board of Education,* 349 U.S. 294, 301, 99 L.Ed. 1083, 75 S.Ct. 753 (1955) (Brown II), see also *Green v. County School Board,* 391 U.S. 430, 437-438, 20 L.Ed. 2d 716, 88 S.Ct. 1689 (1968), that is, to eliminate from the public schools within their school system "all vestiges of state-imposed segregation." *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15, 28 L.Ed. 2d 554, 91 S.Ct. 1267 (1971).

Keyes v. School District No. 1, 413 U.S. 189, 200, 37 L.Ed. 2d 548, 558-559, 93 S.Ct. 2686, — (1973).

Thus, it is appropriate for the State defendants to be involved in this action, even at this late date. In practical terms, State defendants have suffered minimal prejudice. This case has been fully litigated by the Board to such an extent that the legal rights of State defendants have not been impaired. State defendants, with some justification, also argue that the Board could have avoided incurring some costs by relying at an earlier date on the professional

expertise possessed by the State. This consideration does not directly affect the immediate question of whether state defendants should remain as defendants, but it will be relevant when the Court addresses the question of what portion of the costs involved in the Nashville desegregation plan should be borne by State defendants.

Furthermore, it is noteworthy that State defendants have had the opportunity to participate in the formulation of the desegregation plan for the 1983-84 school year, a plan which has not yet been adopted by this Court. Although the order making State defendants parties to this action did not provide State defendants a meaningful opportunity to participate in the 1981 hearings, they have been parties during the most recent deliberations necessitated by the Sixth Circuit's order in July 1982 reversing portions of this Court's 1981 desegregation plan. The motion to vacate the March 26, 1981 order making State defendants parties to this action did not act as a stay to the original order. Consequently, State defendants have had, and continue to have, the opportunity to participate in the fashioning of a desegregation plan. This opportunity is more than the State of Arkansas was afforded in one recent desegregation case. See *United States v. State of Arkansas,* No. LR-C-72-290, April 9, 1980 (E. D. Ark) (State defendants dismissed prior to adoption of remedy but reinstated one year after entry of order implementing plan).

In conclusion, the Court finds that any prejudice caused State defendants by being named parties in this litigation at such a late date is more than outweighed by other equitable considerations. The State of Tennessee

and the other State defendants must fulfill their duty to effectuate the desegregation plan and eliminate the inequities of a state-imposed segregated public school system.

/s/ Thomas A. Wiseman, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT W. KELLEY, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	CIVIL ACTION
	)	NOS. 2094, 2956
METROPOLITAN COUNTY	)	
BOARD OF EDUCATION OF	)	(Received
NASHVILLE AND DAVIDSON	)	March 9, 1983)
COUNTY, TENNESSEE,	)	
ET AL.,	)	
	)	
Defendants.	)	

ORDER

In accordance with the accompanying Memorandum, it is hereby ORDERED that State Defendants' motion to vacate this Court's order making them parties to this action is denied.

ENTERED:

/s/ Thomas A. Wiseman, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

ROBERT W. KELLEY, et al.	)	
	)	CIVIL
	)	ACTIONS:
V.	)	2094 and 2956
	)	
	)	(Received
METROPOLITAN COUNTY BOARD OF EDUCATION, et al.	)	August 19, 1972)

MEMORANDUM TO ORDER ISSUED AUGUST 17, 1972

The defendant school board presented certain hardships in the administration of the integrated school system. Solution of this problem involved either: (a) resegregation of the system, or (b) purchasing twenty-nine (29) busses at a cost of less than one (1) percent of the current budget.

The immediate background of this petition filed by the school board is:

On December 18, 1970, the Sixth Circuit Court of Appeals ordered the District Court to implement desegregation of the dual school system of Metropolitan Nashville, Davidson County.

In July, 1971, an integration plan was approved by the District Court.

An appeal was taken to the Sixth Circuit Court of Appeals which affirmed the holding of the District Court in dismantling the dual school system.

In the Court of Appeals and now in this Court, the school board asserts that in effect the implementation of

the plan creates hardships which endanger the health and safety of certain of the students.

The matter was brought to the attention of this Court by a petition which contained two parts. Part II sought minor changes in the zone lines of the elementary schools as set forth in the petition. Since, in accordance with the original order entered in this case, the school board could have made said minor changes without permission from the Court and since the changes do not tend to resegregate the schools, they are approved.

Part I of the petition asserts that because of the extreme hardship on some children brought about by the required bussing [sic] of children, it is necessary to resegregate three junior high schools which would also affect the student population of twelve junior high schools.

The reason advanced for the necessity of the resegregation is that it does not have sufficient busses to transport the children as required by the integration order, without requiring some children to walk home from school after dark or walk home in the dark after having alighted from the bus. On some occasions they are required to walk on streets without sidewalks. This is due to the lack of twenty-nine busses. By the resegregation of the three junior high schools with the consequent effect on nine other junior high schools, twenty-nine busses could be freed to transport the children so that they could leave the school grounds at an earlier hour and reach home before dark.

In the school year 1970-71 approximately 34,000 students were transported by the defendants to maintain a segregated school system, which since 1954 has been for-

bidden by the law. As a result of the court order 45,000 school students were transported during the 1971-72 school year. The school board transported these students by the use of 211 large busses. In order to implement the integration plan additional busses were needed. The school board, seeking a grant of $3,714,000.00, applied to the federal government for funds to purchase busses. This request was denied. Thereafter the school board requested the City Council to furnish funds for the purchase of additional school busses. This the City Council refused to do. No busses were purchased to implement the plan. As a result of the failure to obtain funds the school board staggered the opening school hours from 7:00 a.m. to 10:00 a.m. each morning. In order to comply with state requirements that each student have a certain minimum number of hours of classroom attendance the afternoon departure times from schools were likewise staggered. The last bus carrying elementary students departed school at 4:30 p.m. The average time spent by a student on the bus in the school system was thirty-four minutes, with some spending more. During the winter months some children thus left school at dusk and arrived at home after dark. This applied both to those children who rode the bus and those who walked to school. Fifty-four hundred and fifty-six (5456) children were in this category. Thirty-two hundred and eighty-five (3285) were transported by bus and Twenty-one hundred and seventy-one (2171) walked. If twenty-nine busses were available the children could leave school at 4:00 p.m. and arrived home before dark.

The school board further asserts that adequate patrols are not available to furnish the protection for the children, and that some children walk on streets which have no side-

walks, and on roads which have no shoulders and are subject to unreasonable risks.

With these problems widely known, the school board submitted its request for the 1972-1973 school budget to the City Council. Although the City Council increased the board's operating budget by some $4,000,000.00 so that it totalled $65,965,263.00, it refused to appropriate any funds for the purchase of busses to implement the integration plan or to alleviate the above-mentioned hardships. The school board asserts that its 211 busses are being fully utilized, with no backup busses. It asserts that on some mornings in excess of thirty busses are inoperable. As a result, affected school children arrive at schools late in the day. It further asserts that only because of a mild winter in 1971-72 did major breakdowns not occur. Therefore it asserts that the only alternative is to resegregate three junior high schools, which plan would affect the student population of twelve junior high schools. The school board asserts that it cannot find funds in its $65,000,000.00 budget to purchase twenty-nine school busses which would cost less than $500,000.00.

Budget

The Court has examined the budget, and the accompanying testimony. It would appear that if the willingness and desire were present, less than one percent of the entire school budget (which totals $65,000,000.00) could be allocated to the acquisition of the necessary busses.

Implementation of the Plan

After going through the motions of asking the City Council for funds to purchase the needed busses, the

school board in effect said "We have complied with the court order. We have requested funds and the request has been denied. We do not need to make any additional efforts. We do not need to cut other expenditures in any other area to insure that the full constitutional rights of children are secured. We have rendered lip service to the Constitution."

The Court holds that this surface compliance does not meet the minimum requirements of dismantling a dual school system. The Court feels that a school board which has been adjudicated three times as violating the equal protection rights of school children must do more. Effort and sacrifice are not unknown to the American dream of equality under the law.

It would indeed be pleasant if public officials could evade their responsibility when unpleasant and unpopular issues arise. However, this is not possible. If individuals desire to hold public office, they must be willing to comply with minimum Constitutional requirements.

This Court finds that the defendant school board has not made a good faith effort to comply with the court ordered integration plan. It has not realigned its budget expenditures so as to sufficiently meet the minimum Constitutional requirements in the implementation of the integration plan.

Defendant school board was apprised of its apparent bad faith by the Sixth Circuit Court of Appeals. In its opinion filed May 30, 1972, the Court of Appeals, referring to a report filed on behalf of defendant pointed out that "Even more important, the statement on its face suggests that local authorities in Nashville and Davidson County

have not made good faith efforts to comply with the order of the District Judge." *Kelley, et al. v. Metropolitan County Board of Education, et al.*, Nos. 71-1778-79, filed May 30, 1972, at 24.

Findings of Fact

1. The school board did not purchase one piece of equipment for the purpose of converting the school system from a dual school system segregated by race into a unitary one.

2. By reason of the failure of the school board to purchase adequate transportation equipment, the ordered integration plan was deficiently implemented.

3. Sufficient funds are available in the school budget of the school board for the school year 1972-1973 to purchase the needed school busses.

4. No Constitutionally sufficient reason was advanced by the school board for the resegregation of the school system.

5. The school board has not made a good faith effort to obtain sufficient busses to implement the court ordered integration plan.

Conclusions of Law

In light of these findings of fact, this Court is of the opinion that the acquisition of thirty (30) additional school busses is the course best suited to both alleviate hardships present during the 1971-72 school year and to advance the orderly and efficient establishment of a unitary school system in Metropolitan Nashville. It is therefore held that the school board is directed to purchase the

additional busses. In the interim period prior to their arrival, siutable busses shall be rented or otherwise provided for. This relief is decreed as part of the continuing jurisdiction retained by this Court in its order of June 28, 1971, over the integration of the Metropolitan Nashville Davidson County School System. This relief is founded upon the inherent power of a court of equity to fashion remedies necessary to assure the implementation of its decrees. It is well established that the District Courts have wide discretion in school desegregation cases to insure the establishment of a unitary system of public education:

> "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a District Court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971).

Since the decision of the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), this Country has been committed to the destruction of the dual school system with its inherent inequality, and to the establishment of a unitary school system with its inherent equality. Although *Brown* was specific in its abolition of the maintenance of dual school systems, it was general in its guidelines as to the manner and time of rectification. In 1968, the Supreme Court in *Green v. County School Board*, 391 U.S. 430 (1968), addressed itself to the slow pace of school desegregation, and stated:

> "The burden on a school board today is to come forward with a plan that promises realistically to work

> . . . now . . . until it is clear that state-imposed segregation has been completely removed." *Id* at 439.

Thus, having decided in 1954 that systems of segregated schools are inherently unequal, and deciding in 1968 that "now" is the time to erase the remaining vestiges of past school segregation, there still remained the question of what steps could be taken by District Courts in the implementation of unitary school systems. The answer to this came in 1971. In *Swann v. Charlotte-Mecklenburg Board of Education,* supra, the Supreme Court enunciated the guidelines to be followed by the District Courts in dismantling dual school systems. The use of transportational facilities was among the four problem areas outlined in *Swann,* and the Court found "no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation." *Swann,* supra at 32.

The plan adopted by this Court necessarily contemplated bus transportation to create a unitary school system consistent with the requirements of *Brown.* Such bus transportation was found reasonable by the Sixth Circuit Court of Appeals as a permissible tool of desegregation under *Swann.* See *Kelley, et al v. Metropolitan County Board of Education, et al, supra.* The additional measure which this Court finds necessary today is not an extension of the bussing contemplated in the original plan of desegregation, but is merely the implementation of that plan required to secure to every school pupil his or her Constitutional right to equal and quality education. In the past school year, many of the school children of the Nashville area have been exposed to unreasonable hardships and potential dangers in exercising this Constitutional right to

equal educational opportunity. After a hearing, this Court finds that the cause of the hardships is not bussing per se, but is the consistent refusal of the school board and the City Council to provide an adequate number of school busses to implement effectively the plan of this Court. There is ample evidence that they are capable of doing so. In effect, the defendant to this cause has endeavored to accomplish indirectly what it cannot permissibly accomplish directly—the frustration of this Court's plan to establish a racially integrated school system. Then, relying upon the state of public unrest resulting from the staggered bussing schedules made necessary by their refusal to provide adequate school transportation, the defendant petitioned this Court to retreat from the integration progress made in the past year and to resegregate a number of schools in order to free the twenty-nine school busses necessary to relieve the burdensome schedule. This, by its very terms would be unconstitutional under *Brown* and its progeny. But, this is the only solution proposed to this Court by defendant.

In order to achieve an equitable solution to the troublesome issues facing the parties to this action and the citizens of Metropolitan Nashville, Tennessee, this Court holds that the defendant school board shall purchase such additional busses as are required to accomplish the terms of its order previously issued in this case. Testimony at the hearing, August 16, 1972, tended to show that certain members of the City Council and the Mayor of Nashville have applied pressure upon the school board to impede the effective implementation of the ordered plan. Therefore, pursuant to Rule 21, *Federal Rules of Civil Procedure*, the City Council and Mayor of Nashville have been joined as

parties defendant, and temporarily restrained, pending a hearing on the merits, from interfering in any manner with the implementation of this order by the defendant school board. United States District Courts have authority to prevent interference with its integration orders and protect rights guaranteed by the United States Constitution with a restraining order or an injunction. *Bullock v. United States*, 265 F.2d 683, 691 (6th Cir. 1959), *cert denied* 360 U.S. 909 (1959) and 360 U.S. 032 (1959), *reh'g. denied* 361 U.S. 855 (1960): *United States v. Farrar*, 414 F.2d 936 (5th Cir. 1969); *Kasper v. Brittain*, 245 F.2d 92, 95 (6th Cir. 1957), *cert. denied* 355 U.S. 834 (1957), *pet. for reh'g. denied* 355 U.S. 886 (1957); *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956); *United States v. Wallace*, 218 F. Supp. 290 (N.D.Ala. 1963); *Mapp v. Board of Education of the City of Chattanooga*, Civil No. 3564 (E.D. Tenn. filed February 4, 1972). *See also, Montgomery County Board of Education v. Shelton, supra.*

To the extent that such remedies are novel or unique, they are nonetheless but another example of the malleable tools which courts of equity have traditionally employed in fashioning appropriate relief in attaining the ends of justice:

> "The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." *Swann, spra* [sic] at 31.

The determination by this Court of those remedial measures which are required to establish a viable and effective unitary school system is nothing more than a dis-

charge of the responsibility imposed by the Supreme Court:

> "The obligation of District Courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Green v. County School Board, supra,* at 439.

Many diverse circumstances and options will undoubtedly surface as individual cases come before the courts, but none of more significance and importance than the good faith efforts of local school authorities in employing available resources in a sincere effort to advance the spirit as well as the letter of the law. That factor may well be decisive in a negative as well as positive posture, and where good faith is lacking the courts may consider this element in fashioning relief:

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."
>
> *Brown v. Board of Education, supra,* at 299.

This Court has found ample evidence in the instant case that the defendant has not exhibited that measure of good faith commensurate with a dutiful implementation of this Court's school desegregation plan. Such lack of good faith has been evidenced by the asserted inability of the school board to spend and the refusal of the City Council to appropriate the available funds necessary to purchase the

transportational facilities essential to a reasonable and orderly execution of that plan. The basic thrust and end result of defendant's actions has been to perpetuate and endorse a bussing schedule so unreasonable and harsh that not only has the principal goal of a unitary system been obscured by public reaction and indignity, but also that the health, safety, and security of the children involved have been compromised by their exposure to risks and dangers. Such a program is not conceived in a spirit devoted to the abolition of segregation, and to quote a recent decision from the Fourth Circuit:

> ". . . if reassignment is mandated constitutionally, it must be effective and meaningful and 'more than a matter of words'. To repeat, the Court cannot compel the student to attend a distant school and then fail to provide him with the means to reach that school . . . What is determined here is that the school district as a part of its plan of desegregation must provide a practical method of affording free bussing for students assigned to schools beyond normal walking distance of their homes; the mechanics of the method to be employed by the school district in discharge of this duty are for the District Court." *Brewer v. School Board of City of Norfolk, Virginia*, 456 F.2d 943, 947, 948 (4th Cir. 1972).

What is practical will of necessity depend upon local circumstances, resources, and student dispersement, but in any case it should be that degree of transportation most reasonably calculated to effect the orderly and expeditious dismantling of a dual school system. In making this determination, school board authorities should be guided by a comparison of the best possible transportation plan under any set of circumstances versus that manner of transportation financially practical in their own

particular situation. When this analysis yields a program of school bussing reasonable and adequate within a given community, in light of all the prevailing circumstances, then it would indeed be improvident for a District Court to interfere. However, when a District Court finds, as it does in the instant case, that an unreasonable and inadequate program of school transportation has been instituted, not in response to realistic limitations of financial resources, but in creation of logistical barriers to the establishment of a unitary school system, then the Court can and will intercede.

The measures employable in this intercession can properly include directive orders in the utilization of public funds.

> "The day is past when courts held that available injunctive relief did not encompass orders specifying the manner in which state officials might collect or disburse public funds. When taxing or spending powers have been used in such a manner as to infringe upon Constitutional guaranties, and in cases when the exercise of such authority pursuant to judicial order is a form of relief 'necessary to prevent further racial discrimination', a federal court may govern by decree the discretion of state officers over the levying and diversion of public funds." *Bradley v. School Board of City of Richmond, Virginia,* 325 F.Supp 828, 846, (E.D. Va.1971)

In seeking to remedy Constitutional violations, a federal court may order that public funds be expended, particularly when such expenditure is necessary to meet the minimum requirements mandated by the Constitution. *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 233, 84 S.Ct. 1226, 1234, 12 L.Ed. 2d 256 (1964);

Eaton v. New Hanover County Board of Education, 459 F.2d 684 (4th Cir. 1972); *Brewer v. School Board of City of Norfolk, Virginia, supra; Plaquemines Parish School Board v. United States,* 415 F.2d 817 (5th Cir. 1969); *Hosier v. Evans,* 314 F. Supp. 316 (D.V.I. 1970); *United States v. School District 151 of Cook County,* 301 F.Supp. 201 (D.C. 1969), modified 432 F.2d 1147 (7th Cir. 1970), *Cert. denied* 402 U.S. 943 (1970); *United States v. State of Texas,* 342 F.Supp. 24, 37, 38 (E.D.Tex. 1971); See also *Bradley et al v. Milliken et al,* Civ. No. 3527, filed July 11, 1972, currently on appeal to the Sixth Circuit Court of Appeals.

Given the choice presented by the school board to this Court on August 16, 1972, of whether, in order to protect the health and safety of the school children, to resegregate or to provide for more busses, this Court is compelled to order the relief outlined supra. Moreover, the Court deems the relief ordered herein to be a proper exercise of its power to provide equitable remedies in the implementation of a desegregation plan which "is well within the capacity of the school [board's] authority." See: *Swann, supra,* at 30. The school board has told this Court that the health and safety of some children are endangered by compelling them to return home after dark. Public misunderstanding and furor notwithstanding, this Court shall not allow children to be unequally and unreasonably subjected to the dangers that have been shown to exist and, furthermore, this Court shall not allow the integration of

the Nashville schools to be thwarted. It cannot fulfill its Constitutional obligation by requiring less.

This Court must uphold and apply the law, and the law to be applied herein is clear. Fortunately, the rights of minorities do not exist at the whim of public caprice, and although this Court is not unaware of public resistance to integration of the Nashville schools, it shall protect those rights guaranteed by the Constitution.

/s/ L. Clure Morton
United States District Judge

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[1] Although cognizant of the fact that Judge Merhige's desegragation order (338 F.Supp. 67) was reversed on grounds concerning the consolidation of political subdivisions, the Court is of the opinion that the exercise of equitable power by the Richmond Cout [sic], directing the expenditure of funds, was left undisturbed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT W. KELLEY, ET AL, HENRY C. MAXWELL, ET AL.	)	
VS.	)	CIVIL NOS. 2094 AND 2956
METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL.	)	(Received Aug. 31, 1972)

ORDER

A hearing was had in this action August 24, 1972, after the Honorable L. Clure Morton, United States District Judge for this District, had recused himself by order entered August 22, 1972. The matters considered at the hearing and the actions taken are set forth hereinafter.

The first matter before the court was the report of the defendant Board of Education of the action it had taken in compliance with an order entered herein August 17, 1972, directing the Board to purchase thirty busses of eighty-four-passenger capacity each, and to rent such busses as were necessary pending delivery of the purchased busses.[1]

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[1] The court's order was in response to a petition filed by the defendant Board of Education asserting that, due to the staggering of school hours, some children were required to return home from school after dark, a dangerous situation in terms of their health and welfare. To alleviate this situation, the court was faced with the choice of permitting the resegregation of three junior high schools (as suggested by the Board) or providing for additional transportation. Since the Board's suggestion was obviously Constitutionally impermissible, the court directed the acquisition of additional buses.

James H. Harris, III, Esquire, attorney for the school board, orally presented the report. Briefly summarized, the report stated that arrangements had been made for the purchase and immediate delivery of twenty new sixty-six passenger buses, the ordering of fifteen eighty-four passenger busses to be delivered within six months and the leasing of fifteen used busses for service until delivery of the ordered busses. The oral report contained no statement as to the passenger capacity of the rental busses; however, the court has been informally advised that the rental busses are of the seventy-two-capacity type. Assuming that this is correct, the court finds that the report of the school board shows a good-faith compliance with the previous order, and it is, accordingly, approved.

The next matter considered by the court was the joinder of the Metropolitan Government of Nashville and Davidson County, Tennessee, as a party defendant. By order of August 17, 1972, the court had granted a motion which had been made by plaintiffs for the joinder of additional parties, but, apparently through oversight, the Metropolitan Government of Nashville and Davidson County, Tennessee, was not formally joined, although it was apparent from the hearing that all parties understood that it had been so joined. To complete the record, the court ordered said joinder.

The court next heard motions filed by certain of the joined defendants that they were entitled to summary judgment or that the action should be dismissed as to them. These motions were grounded on the assertion that the action was moot as to the joined defendants because the school board had complied with the court's order as to

the purchase of busses. A consideration of the motion for joinder indicated clearly to the court that the action was not moot as to the joined defendants; that they could have been joined previously and are now properly joined under the provision of Rule 20, Federal Rules of Civil Procedure. Accordingly, the motions seeking dismissal or summary judgment were denied.

Next, the court considered motions filed to vacate or strike the provisions of the order of August 17, 1972, relating to a temporary restraining order, to wit: paragraphs 7 and 9 of that order. The court was of the opinion that, since the school board had complied with the order pertaining to the purchase or rental of busses, the purpose of the temporary restraining order had been fulfilled and that it should be, and accordingly was, vacated.

The court rejected the contention that the temporary restraining order was in violation of any rights of the defendants secured to them by the First Amendment to the Constitution of the United States. This court is of the opinion that this Amendment protects the rights of citizens to make such statements, wise or foolish, as they are enabled to make by reason of their several abilities and are permitted to make by their several consciences. There is no right, under the First Amendment, to threaten punitive action against anyone because of obedience to the lawful orders of a court. The court was, and is, of the opinion that the temporary restraining order issued was fully justified by the totality of circumstances appearing to the court on August 17, 1972. The vacation of the order is based on the court's trust that all defendants in the case will now proceed, in good faith, to assist in the implemen-

tation of the orders heretofore entered in this action by both of the judges who have heretofore handled this case during its long history to the effect that the dual system of education heretofore found to exist be abolished.

/s/ Frank Ivy, Jr.
CHIEF JUDGE

ATTESTS A TRUE COPY

ILLEGIBLE

Supreme Court, U.S.
FILED
JUN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,
Petitioners,

vs.

STATE OF TENNESSEE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Sixth Circuit

REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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No. 87-1774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

Petitioners,

vs.

STATE OF TENNESSEE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Sixth Circuit

REPLY BRIEF

The issues herein concern the proper interpretation of this Court's decision in *Milliken v. Bradley,* 433 U.S. 267 (1977) (*Milliken II*), and more broadly, the ability of district courts across the country to provide complete remedial relief and to insure quality education to victims of state-imposed segregation. The Sixth Circuit improperly interpreted *Milliken II,* contrary to decisions from the Seventh and Eighth Circuits, which hold that the Eleventh Amendment poses no bar to orders requiring state financial participation in local desegregation plans, and that such orders are an appropriate and necessary exercise of a federal court's equity jurisdiction. Although full argument on

the merits of these questions is properly reserved for briefing on the merits, the Petitioners take this opportunity to reply to the Respondents' Brief in Opposition:

1. The Respondents strain in their attempt to distinguish *Milliken II* and the myriad of cases from the Courts of Appeal for the Seventh and Eighth Circuits which have rejected Eleventh Amendment defenses and required state defendants to fund significant portions of local desegregation plans. The Respondents argue pursuant to *Papason v. Allain,* 106 S.Ct. 2932, 2941 (1986), that a court most "look to the substance rather than the form of the relief sought." Contrary to their assertion, the substance of the remedy sought and ordered in this case is consistent with that sought and ordered in *Milliken II* and other cases.[1] As stated in the Board's Petition for Certiorari, Michigan, Missouri, Arkansas and Indiana were in actuality nothing more than recalcitrant finanial participators. Insofar as the Petitioners are aware, in none of these cases did the state defendants actually develop or implement a local desegregation remedy. Instead, as in *Milliken II,* the remedy was proposed and/or implemented by the local school district, and the state defendants merely paid a portion of the costs

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[1] *E.g. Liddell v. Board of Education of the City of St. Louis,* 667 F.2d 643 (8th Cir.), *cert. denied,* 454 U.S. 1081 (1982); *Liddell v. Board of Education,* 839 F.2d 400 (8th Cir. 1988); *Little Rock School District v. Pulaski County Special School District,* 839 F.2d 1296 (8th Cir. 1988); *Jenkins v. Missouri,* 672 F.Supp. 400 (W.D. Mo. 1987); *United States v. Board of School Commissioners of Indianapolis,* 677 F.2d 1185 (7th Cir.), *cert. denied,* 459 U.S. 1086 (1982).

through the legal actions of the local school districts themselves.[2]

The reasons for this typical course of events are apparent when the activities of the Tennessee Respondents in Nashville are examined. In its opinion of March 9, 1983, the District Court stated that "the state defendants have had an opportunity to participate in the formulation of the desegregation plan [for Nashville] for the 1983-84 school year, a plan which has not been adopted by this court."[3] The record in this case shows that the Respondents declined to participate in devising the remedy ultimately ordered by the court, even though their input was sought at every step.[4] The District Court's order approving the desegregation plan for Nashville and ordering its implementation is not directed specifically to either the local Board or the Respondents, and it specifically notes that the Respondents offered no objections to implementation.[5] It is little wonder that the District Court later looked to the state for financial participation rather than to specifically amend its implementation order to require the Respondents to educate or bus students. Had it ordered the Respondents to educate and/or bus students, which even the Respondents appear to concede would be permissible

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[2] It was the local Detroit school district, not the plaintiffs in *Milliken* or the state defendants who developed the educational components for which the state defendants were required to pay. It was also the local school district who sought contribution from the state defendants to fund those components. See *Bradley v. Milliken,* 540 F.2d 229, 242 (6th Cir. 1976) (Detroit Board, not plaintiffs, appealed from allocation of costs of the district court); *Bradley v. Milliken,* 402 F.Supp. 1096, 1103 (E.D. Mich. 1975) (Detroit Board of Education submitted desegregation plan, including educational components).

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[3] Respondents' Appendix, p. 30.

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[4] Supplemental Appendix B, p. A-6.

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[5] Supplemental Appendix A, p. A-1.

under the Eleventh Amendment, then most certainly the result would have been no different than that in *Millikien II*. That is, the Nashville Board would be implementing the desegregation remedy it designed with some state funds.

Simply put, in all of these cases, as in the instant case, the money the state is required to pay is *directly tied* to a desegregation plan designed to directly benefit those victims of discrimination who suffer currently from previous state-imposed or maintained segregation. The Sixth Circuit and the District Court previously found that such current vestiges of state-imposed segregation remain. 687 F.2d 814 (6th Cir. 1982) (A. 59-62); 615 F.Supp. 1139 (M.D. Tenn. 1985) (A. 31). Even under the Respondents' theory, all the District Court needs to do is simply amend its order requiring implementation to specify that the Respondents provide educational programs and busing designed to eliminate those vestiges rather than to merely require that the plan be implemented. Surely this is form over substance.

2. The Sixth Circuit noted the conflict between its opinions and those from the Seventh and Eighth Circuits regarding the Eleventh Amendment without distinguishing those cases,[6] and relied upon a *dissenting* opinion from the Seventh Circuit for the proposition that an award of desegregation costs against a state is not an appropriate exercise of federal equity jurisdiction.[7] These references, without more, demonstrate that the

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[6] The Sixth Circuit cites the Seventh and Eighth Circuit opinions and indicates that the circuits are divided. 836 F.2d at 995, n. 4 (A. 17).

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[7] *United States v. School Commissioners of City of Indianapolis*, 677 F.2d 1185, 1190-91 (7th Cir.) (Posner, J. dissenting), *cert. denied*, 459 U.S. 1086 (1982).

Sixth Circuit itself was clearly aware that its opinion was presenting a conflict in the circuits, yet the Respondents argue that there is no conflict between this case and those in other circuits because the issues are somehow different.

The Respondents' attempt to distinguish this case from others because the school system, rather than the victims of discrimination, is seeking relief, is also strained and should be rejected. First, in many of these cases, efforts seeking state funding were led by the local school districts or local authorities when the costs of desegregation became apparent.[8] Most importantly, acceptance of such a distinction would set a dangerous precedent, by requiring victims of discrimination to continually police these cases because a local school system is precluded from assuring these victims that they will be provided a desegregated quality educational experience.

Finally, the Respondents' reliance on *United States v. Texas Education Agency,* 790 F.2d 1262, *cert. denied,* 107 S.Ct. 874 (1986), is misplaced. In that case, there was never any finding of state liability nor any effort made to divide the cost of the desegregation remedy. In this case, both the District Court and the Court of Appeals have held, while the state defendants have been parties, that vestiges of state-imposed segregation remain, and the District Court has made a finding of liability. The remedy fashioned by the District Court in 1983, while the Respondents sat mute, was founded on the proposition that black achievement was lagging behind white achievement, and that racial imbalance in certain schools had persisted, all resulting from the inherent problems encountered over the years

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[8] See n. 2, *supra. See also Little Rock Special School District v. Pulaski County Special School District,* 778 F.2d 404, 408 (8th Cir. 1985); *Jenkins v. State of Missouri,* 672 F.Supp. 400, 402, 405, 409 (W.D. Mo. 1987); *Liddell v. State of Missouri,* 731 F.2d 1294, 1298 (8th Cir. 1983).

by the parties and the District Court in eliminating the results of historical segregation.[9] With this history, the District Court appropriately applied the concept of continuing constitutional violation set forth repeatedly by this Court,[10] a violation the Respondents have an unmet affirmative duty to correct.

3. In the Respondents' argument that the District Court exceeded its equity jurisdiction by requiring the state of Tennessee to pay 60 percent of the current costs of Metro's desegregation plan, they refer to none of the many cases, including *Milliken II,* which approve such remedies. As indicated in the Petition for Certiorari, Courts of Appeal, including the Sixth Circuit, have required other states to pay significant portions of local desegregation costs, to wit: Missouri, Arkansas, Michigan, Ohio, and Indiana, holding that such remedies are a permissible exercise of federal equity jurisdiction.[11]

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[9] The District Court stated in 1981 that "the good faith efforts of this [school] Board to achieve desegregation have been amply demonstrated. . . ." (A. 121.) It was the racial imbalance resulting from the court's efforts in 1971 to devise a comprehensive desegregation plan that led to the new 1983 transportation remedy because the court's plan encouraged population shifts to parts of the county not previously included in the plan. Referring to its own 1971 efforts to remedy desegregation, the District Court stated that "[t]he perimeter line drawn by the court in 1971 . . . has encouraged white flight to the suburbs and to those school zones unaffected by the 1971 order. . . . The resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the implementation of the court's order, amounts to a *de jure* segregation." (A. 189-91.)

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[10] *Milliken v. Bradley,* 433 U.S. 267 (1977); *Columbus Board of Education v. Penick,* 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman,* 443 U.S. 526 (1979).

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[11] See cases refereed to in Petition for Certiorari, pp. 21-22. For example, in the seminal *Milliken* case, Michigan was required to pay 75 percent of the cost of purchasing 150 school buses and 50 percent of educational components. *Bradley v. Milliken,* 540 F.2d 229, 240, 246 (6th Cir. 1976), *aff'd* 433 U.S. 267 (1977).

The Respondents argue that there is no basis for the 60 percent figure set by the District Court, yet the basis is actually clearer than in many other cases. In virtually all of the cases requiring state financial support, there is no real discussion of the percentage awarded nor is there any readily apparent benchmark for the award.[12] Here, the District Court apparently calculated the percentage based upon the increased expenditures for programs which the Court of Appeals had mandated to remove the remaining vestiges of state-imposed segregation.[13] As indicated previously in the Petition for Certiorari, the District Court had sought to pay for remedial programs through decreasing the transportation expense, a decrease the Court of Appeals would not approve. When faced with the task of requiring implementation of *both* extended busing *and* extensive educational components in light of the school board's budget, the District Court appropriately placed the onus for the increase on the state defendants.

Thus, the remedy ordered by the District Court is not, as the Respondents argue, merely the settlement of an internal controversy between political subdivisions. Rather, it is based upon the District Court's reasoned efforts to insure that the Nashville school system can provide quality education for the victims for whom this litigation was orginally brought. This case is no different from those many cases in other circuits and in the Sixth Circuit itself which have approved remedies designed to achieve this result.

[12] Little is contained in any of these opinions regarding the amount of relief, other than general pronouncements regarding a state's relative culpability along with the financial realities in the relevant school district. *See United States v. Board of School Commissioners of the City of Indianpolis,* 677 F.2d 1185 (7th Cir. 1982) (100 percent of costs awarded); *Liddell v. State of Missouri,* 731 F.2d 1294, 1333, (8th Cir. 1984) (approximately 80 percent of costs awarded); *Bradley v. Milliken,* 540 F.2d 229, 246 (6th Cir. 1976) (50 percent of costs awarded). See also Petition for Certiorari, pp. 21-22.

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[13] See Petition for Certiorari, pp. 10-11, n. 4.

CONCLUSION

For the reasons previously stated in their Petition for Certiorari, the Petitioners respectfully submit that this case raises issues and interpretations of this Court's previous rulings about which the circuits are not in agreement. These important issues are continuing to arise across the nation, and direction from this Court is necessary to insure uniformity and guard against confusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certifiy that a copy of the foregoing response has been mailed this 8th day of June, 1988, to the following counsel:

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SUPPLEMENTAL APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

Civil Action Nos. 2094, 2956

Robert W. Kelley, et al.,
Plaintiffs,

vs.

The Metropolitan County Board of Education of
Nashville and Davidson County, Tennessee, et al.,
Defendants.

ORDER

(Received for Entry 8:30 A.M., June 1, 1983)

In conformity with the Memorandum entered this day approving a new desegregation plan for Metropolitan Nashville and Davidson County, the plan as presented by the Metropolitan Nashville Board of Education on April 14, 1983, is hereby approved and ordered to be implemented.

ENTER this 31 day of May, 1983.

/s/ Thomas A. Wiseman, Jr.
United States District Judge

Approved For Entry:

WILLIS & KNIGHT

By: /s/ William R. Willis, Jr.

By: /s/ Marian F. Harrison
215 Second Avenue, North
Nashville, Tennessee 37201

Attorneys for Defendant Board
of Education

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

Civil Action Nos. 2094, 2956

Robert W. Kelley, et al.,
Plaintiffs,

vs.

The Metropolitan County Board of Education of
Nashville and Davidson County, Tennessee, et al.,
Defendants.

MEMORANDUM

(Received for Entry 8:30 A.M., June 1, 1983)

On April 14, 1983, this Court held a hearing on the Board of Education's "Plan Submitted in Response to Opinion of the Court of appeals for the Sixth Circuit," filed by the Board on April 8, 1983. Testimony explaining the plan, utilizing maps, statistics, and other exhibits, was offered by the Board, and opportunity for cross-examination and/or objection was afforded to the Plaintiffs and the State Defendants. No objections were made by either the Plaintiffs or the State Defendants.

From the testimony and exhibits submitted, the Court finds that the plan presented by the Board as described in its pleading of April 8, 1983, and the amendment thereto filed on April 14, 1983, meets fully the criteria set out by the Court of Appeals in its opinion on July 27, 1982, and the mandate issued pursuant thereto. Specifically, the pupil assignment plan submitted by the Board begins with the existing ratio of blacks to whites in the population as a starting point to maximize integration as defined by the Court of Appeals. That is, every effort has been made to draw zones for schools which will approximate the 33% black school population presently existing in the school system, with a deviation of 15% on either side of this percentage. Where

deviations from this ratio have occurred and will occur, they are the result of factors beyond the Board's control, including but not limited to demographic considerations which would necessitate extraordinarily long transportation distances to the nearest concentration of black or white students to correct the imbalances. It is clear from the proof that the greatest possible effort has been made to maximize desegregation within the guidelines set forth by the Court of Appeals, and accordingly the plan is approved in its entirety.

The pleadings filed by the Board on April 8, 1983, and on April 14, 1983, along with the exhibits thereto and the maps, exhibits, and testimony describing the plan are incorporated into this decree by reference. In addition, the Agreement in Principle entered into by the Plaintiffs and the Board of Education and filed as Exhibit No. 2 in this cause, is incorporated into this decree by reference. The procedures contained therein for retention of jurisdiction by this Court supersede previous orders and restrictions which have governed this case. These procedures are ordered as follows:

> "[Under the plan as approved, the Board of Education retains] the flexibility to make refinements where necessary in the plan to improve the integrity of zone lines, to improve feeder patterns, and to improve the utilization of buildings, so long as these improvements do not adversely impact the pupil assignment plan."
>
> "[Jurisdiction will be retained] pending implementation of the long range plan, at which time, or five years after the entry of this order, whichever occurs first, any party may move the Court to have the system declared unitary and the case dismissed."
>
> "[While jurisdiction is retained by this Court,] the Board shall report to the Court and counsel for all parties on or before January 1st of each year the following information:

1. An annual update of the Thirteen Year Analysis of Enrollment Patterns;

2. Numbers and use of portables during the current school year;

3. Any proposed new construction or expansion to house more students or regular programs; and

4. Any proposed zone changes with number of students involved by race, grade and school."

"Should any party have any objections to the information contained in the report, those objections must be filed within 45 days from the date the report is filed."

In addition to the pupil assignment plan, it should be noted that this Court has previously approved and ordered, and by this decree continues to approve and order the educational components contained in the previous plan (remediation, "Together We Can, Together We Will," black history, the middle school concept, and magnet school programs), and specifically approves the creation of a magnet school for the academically talented at Hume Fogg High School, a magnet school serving grades 5 - 8 at Caldwell Elementary School, and the Martin Luther King, Jr. Magnet School for the Health Sciences to be established at Pearl when the new Pearl-Cohn High School is completed.

Specific matters relating to faculty and personnel which are now governed by stipulation entered into between the parties on December 8, 1982, are not affected by this order.

An appropriate Order will enter.

/s/ Thomas A. Wiseman, Jr.
United States District Judge

Approved For Entry:

WILLIS & KNIGHT

By: /s/ William R. Willis, Jr.

By: /s/ Marian F. Harrison

Attorneys for Defendant Board
of Education

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Nos. 2094, 2956

Judge Wiseman

Robert W. Kelley, et al.,

vs.

Metropolitan County Board of Education of
Nashville and Davidson County, Tennessee, et al.,

vs.

State of Tennessee; Lamar Alexander, Governor of the
State of Tennessee; Robert L. McElrath, Commissioner
of Education; and State Board of Education,

AFFIDAVIT OF MARIAN F. HARRISON

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

The Affiant, Marian F. Harrison, being first duly sworn, hereby deposes and says:

1. I am a partner in the law firm of Willis & Knight. Along with William R. Willis, Jr., I represent the Metropolitan Nashville Board of Education, et al.

2. On or about February 21, 1983, I drafted the letter attached as Exhibit 1 for William R. Willis' signature. The purpose of the letter was to invite the State defendants to participate in the planning process for the new desegregation plan. At the time this letter was written, the planning process was in its initial stages.

3. Sometime after March 1, 1983, we received the letter attached hereto as Exhibit 2 from Mr. Robert B. Littleton, in

response to our previous letter. He stated that because the State's motion to vacate the Court's order bringing the State into the case was still pending, the State did not wish to participate in the Board's development of a new plan. Based on this letter, I filed a motion to dispose of the State defendants' motion to vacate the order making them parties. Subsequently, on March 9, 1983, the District Court denied the State's motion.

4. After the District Court denied the State's motion to vacate, I called General Frank Scanlon on, to my recollection, at least two occasions to reissue our invitation. At no time did I have any indication from him or anyone else from the State that the State defendants wished to participate in the formulation of the desegregation plan.

5. The State's position was in stark contrast to that of the attorney for plaintiffs, Senator Avon Williams. Senator Williams, at our invitation, made after thecommunications with the State set forth above, indicated a desire to see the plan the Board was then considering. He was shown such plan, and negotiation based on the plan then being discussed in public by the Board began.

6. Shortly after negotiations began, I talked again with Frank Scanlon and Bob Littleton. I then, from Arkansas, dictated by telephone a confirming letter on March 24, 1983, to General Bob Littleton, the purpose of which was to reconvey my invitation that the State counsel and State defendants review the plan under consideration. This letter was signed on my behalf by Dick Lodge of our firm. (Exhibit 3)

7. On March 25, 1983, we received another letter from General Robert Littleton, which *finally* accepted our offer. (Exhibit 4)

8. To my knowledge, at our invitation, General Scanlon attended a subsequent meeting of the School Board. I wrote a letter the next day to General Littleton reciting events of the past

weeks. (Letter of March 29, 1983, Exhibit E.) We continued to suggest to General Scanlon, and other counsel for the State defendants, that they and their clients might want to have a demonstration of the maps and charts being developed at the Board. It is my understanding that staff members from the Board of Education made a presentation to General Scanlon at his convenience, which was taped by General Scanlon for showing to his clients.

9. In spite of my many invitations to the State defendants to participate in the desegregation process, I must say that it appears they never intended to be involved in the planning process.

FURTHER THE AFFIANT SAITH NOT.

/s/ Marian F. Harrison

Sworn to and subscribed before me
on this 19th day of December, 1984.

/s/ Virginia S. Crimmons
Notary Public

My Commission Expires: 11/1/87

EXHIBIT 1

Law Offices
WILLIS & KNIGHT
Two Fifteen Second Avenue, North
Nashville, Tennessee 37201
Telephone
Area 615-259-9600

February 21, 1983

The Honorable Robert Littleton
Assistant Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219

Re: Kelley, et al. v. Metropolitan
Board of Education, et al.

Dear Bob:

I want to make sure that you and your clients understand that their participation in the development of a new desegregation plan for Metropolitan Nashville and Davidson County would be welcomed. Indeed, any assistance that you and your clients could provide is invited. Should you desire, the planning team would appreciate any suggestion you might have, and we invite you to participate in any and all sessions of the team and/or the Board regarding this plan.

I can obtain a schedule of the planning team meetings for you should you wish to participate, and we will keep you advised of our progress.

Very truly yours,

WILLIS & KNIGHT

/s/ Bill

William R. Willis, Jr.

WRW:vc

cc: Mr. Kent Weeks
Mr. Charles Frazier

EXHIBIT 2

STATE OF TENNESSEE

OFFICE OF THE ATTORNEY GENERAL
450 James Robertson Parkway
Nashville, Tennessee 37219

William M. Leech, Jr.
Attorney General & Reporter

William B. Hubbard
Chief Deputy Attorney General

Robert B. Littleton
Special Deputy for Litigation

Deputy Attorney's General
Donald L. Corlew
Jimmy G. Creecy
Robert A. Grunow
William J. Haynes, Jr.
Robert E. Kendrick
Michael E. Terry

Honorable William R. Willis, Jr.
WILLIS & KNIGHT
Attorneys at Law
Two Fifteen Second Avenue, North
Nashville, TN 37201

RE: Kelley, et al. v. Metropolitan
Board of Education, et al.

Dear Bill:

Than you for your letter dated February 21, 1983 inviting the state's participation in the development of a new desegregation plan by the Metropolitan Board of Education.

Due to the fact that the state's motion to vacate the Court's order bringing the state into the case is still pending, the state does not wish to participate in the Board's development of a new plan at this time. If the state's motion to vacate is denied prior to the hearings on the new plan, we must, as counsel for the state, make it clear that the state reserves the right to present such proof as to the plan as may be deemed necessary and appropriate, including the possibility of proposing alternative plans, if necessary.

We would appreciate your keeping us advised of the Board's progress.

Sincerely yours,

/s/ Bob Littleton
ROBERT B. LITTLETON
Special Deputy Attorney General

RBL:mb
cc: Hon. Kent Weeks,
Chairman, Metropolitan Board of Education
Hon. Avon N. Williams
Attorney at Law
Hon. Richard H. Dinkins
Attorney at Law
Hon. Frank Scanlon
Assistant Attorney General

EXHIBIT 3

Law Offices
WILLIS & KNIGHT
Two Fifteen Second Avenue, North
Nashville, Tennessee 37201

March 24, 1983

HAND DELIVERED

General Robert B. Littleton
Special Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

Re: *Kelley, et al. v. Metropolitan Board of Education, et al.*

Dear Bob:

This letter serves as a written invitation to you and your clients to view the proposed plan which is now the subject of negotiations between the Plaintiffs and the Defendant Board of Education. As I suggested to Frank Scanlon on Monday evening and to you on Tuesday, I think it would be in the best interest of all parties if you and your clients understood the proposal now on the table. I understand that in my absence on Wednesday, Dick Lodge again discussed with you the need to arrange a meeting for this purpose. Should you and your clients agree that this meeting is both necessary and beneficial, we should plan to have it immediately.

I look forward to hearing from you early today.

Very truly yours,

WILLIS & KNIGHT

Marian F. Harrison

MFH:vc

EXHIBIT 4

STATE OF TENNESSEE

OFFICE OF THE ATTORNEY GENERAL
450 James Robertson Parkway
Nashville, Tennessee 37219

March 25, 1983
HAND DELIVERED

Ms. Marian F. Harrison
Attorney at Law
WILLIS & KNIGHT
215 Second Avenue, North
Nashville, Tennessee 37201

Re: *Kelley, et al. v. Metropolitan Board of Education, et al.*

Dear Marian:

This is to acknowledge receipt of your letter of March 24, 1983, inviting the State defendants to view a proposed pupil assignment plan which is the apparent product of private negotiations between the School Board and the plaintiffs, of which we had no notice or opportunity to participate.

This office accepts your offer. Of course, due to the facts that our status in the lawsuit was only recently resolved and we have not been privy to negotiations, it is impossible to say at this juncture what position the State defendants will take regarding any plan negotiated by the Board and plaintiffs, or eventually adopted by the Metropolitan Board of Education.

Sincerely yours,

/s/ Robert B. Littleton
ROBERT B. LITTLETON
Special Deputy Attorney General

RBL:jc

cc: Honorable Avon N. Williams

EXHIBIT 5

LAW OFFICES
WILLIS & KNIGHT
Two Fifteen Second Avenue, North
Nashville, Tennessee 37201

March 29, 1983

HAND DELIVERED

The Honorable Robert B. Littleton
Special Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219

Re: *Kelley, et al. v. Metropolitan Board of Education, et al.*

Dear Bob:

Pursuant to our invitation, General Scanlon attended the Board meeting last night at which a desegregation plan to which the plaintiffs have agreed in principle was presented. However, he again could not tell me a firm time when the State defendants could view the plan or discuss any proposed changes or modifications with us. Instead, General Scanlon indicated that he expected part of the State's position to be that they had no input into this or any other plan. We must, of course, reiterate our continuing exception to this position.

Since the Court's status conference in January, we have invited you time and time again to participate or to discuss proposed plans with us, to which invitations your clients have never responded affirmatively with a time or date. Nevertheless, you stated in your letter of March 25, 1983, that you had not been a party to any negotiations. Our repeated invitations to you to participate or to view proposals certainly negate this position.

Unfortunately for us all, we have a deadline which, although extended, must be met in order to comply with the Court of Appeals decision and to provide a timely resolution to this issue for the school system. As you are aware, the Board may vote on the proposal before it tonight, and any lack of participation by your clients must be deemed to have been generated by them, not by the Board.

Indeed, we stand ready at any time to discuss the proposal with you.

Very truly yours,

WILLIS & KNIGHT

/s/ Marian F. Harrison

MFH:vc

cc: The Honorable William M. Leech, Jr.
The Honorable William B. Hubbard
The Honorable Frank Scanlon
Avon N. Williams, Jr., Esquire

P.S. I have just had another telephone conference with General Scanlon wherein he reiterated your clients' desire to view the current proposal before the Board. However, again logistics present a problem for you, and we agreed to arrange for a vidio taping tomorrow of the proposal. As stated above, however, the Board may vote on the proposal this evening, but the video taping is nevertheless acceptable to us.

M. F. H.